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In The

Supreme Court of the United States

October Term, 1998

BLUE CROSS OF CALIFORNIA, CALIFORNIACARE HEALTH PLANS, WELLPOINT HEALTH NETWORKS INC., A California Corporation,

Petitioners,

vs.

CALIFORNIA SUPERIOR COURT; ELIZABETH FARQUHAR and LAURIE WINETT, individually, on behalf of themselves and all others similarly situated,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, Second Appellate District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Arbitration Act, 9 U.S.C. §1 *et seq.*, preempts a state court from requiring a party to an arbitration agreement to litigate class action issues, when enforcement of the agreement, as written, would require individualized, not classwide arbitration?

PARTIES TO THE PROCEEDING

Petitioners Blue Cross of California, CaliforniaCare Health Plans and WellPoint Health Networks Inc., a California Corporation, and Respondents Superior Court of the State of California for the County of Los Angeles and Elizabeth Farquhar and Laurie Winett, individually, on behalf of themselves and all others similarly situated as members of a putative class action of subscribers to petitioners' health insurance plans, are the only parties to the proceeding.

Pursuant to Rule 29.6, petitioners report that Blue Cross of California is an indirect wholly owned subsidiary of WellPoint Networks Inc. and appears as a successor by merger to the interests of CaliforniaCare Health Plans. Petitioner WellPoint Health Networks Inc. has the following non-wholly owned subsidiaries: Unicare National Capital Preferred Provider Organization; National Capital Health Plan, Inc.; and The Industry MSO, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Blue Cross of California, CaliforniaCare Health Plans and WellPoint Health Networks Inc. (collectively "Blue Cross" or "petitioners") respectfully petition for a writ of certiorari to review a judgment of the California Court of Appeal, Second Appellate District, Division Five.

OPINIONS BELOW

The opinion of the California Court of Appeal, Second Appellate District, Division Five issued on October 6, 1998 Appendix ("App.") at App. 1 *et seq.*, is reported as *Blue Cross of California v. Superior Court*, 67 Cal. App. 4th 42, 78 Cal. Rptr. 2d 779 (1998) (hereafter abbreviated "opn."). The court of appeal's order to show cause directed to the respondent superior court was issued on June 11, 1998, App. 37-38, and is unreported. The order of respondent superior court in Los Angeles County Superior Court Case No. BC179834, entered March 2, 1998, granting in part and denying in part, petitioners' motion to compel arbitration and to stay all proceedings in the underlying action, App. 39-42, is unreported. The order of the California Supreme Court denying petitioners' petition for review was entered on January 13, 1999, App. 43, and is unreported.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(a). The judgment of the California court of appeal was entered on October 6, 1998. (Opn. at App. 1-2.) The California Supreme Court's order denying Blue Cross's petition for discretionary review in this matter was entered on January 13, 1999 (App. 43.)

STATUTES INVOLVED

Section 2 of the FAA, 9 U.S.C. §2, provides in pertinent part: "A written provision in any . . . contract evidencing a transaction involving interstate commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable. . . . " Section 4 of the FAA in "any United States district court" and calls for the issuance of an order "directing the parties to proceed to arbitration *in accordance with the terms of the agreement.*" 9 U.S.C. §4 (emphasis added). Section 3 further requires a stay of "any suit or proceeding . . . brought in any of the courts of the United States upon an issue referable to arbitration under an agreement in writing for such arbitration. . . . " *Id.* at §3. (*See* App. 44-47.)

Section 1283.1 of California's Arbitration Act generally permits "consolidation" of arbitrations arising under separate agreements to arbitrate "when: (1) Separate arbitration agreements or proceedings exist between the same parties; or one party is a party to a separate arbitration agreement or proceeding with a third party; and (2) The disputes arise from the same transactions or series of

related transactions; and (3) There is common issue or issues of law or fact creating the possibility of conflicting rulings by more than one arbitrator or panel of arbitrators." (App. 49-51.)

STATEMENT OF THE CASE

Relying upon what it acknowledged was the minority view of a single federal circuit,[1] the California court of appeal rejected the position of seven other U.S. Courts of Appeals, including the Ninth Circuit,[2] that have held consolidated or classwide arbitration cannot be ordered under the Federal Arbitration Act (hereafter "FAA") where the agreement between the parties does not provide for such arbitration. The California court also purported to distinguish the federal majority rule on the ground that it was based upon the provision in §4 of the FAA, which requires federal courts to "direct[ ] the parties to proceed to arbitration in accordance with the terms of the agreement" to arbitrate, instead of §2 of the Act

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[1] *See New England Energy, Inc. v. Keystone Shipping Co.*, 855 F.2d 1, 5 (1st Cir. 1988) (hereafter "*New England Energy*").

[2] *See, e.g., Champ v. Siegel Trading Co., Inc.*, 55 F.3d 269, 274-75 (7th Cir. 1995); *Baesler v. Continental Grain Co.*, 900 F.2d 1193, 1195 (8th Cir. 1990); *Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp.*, 873 F.2d 281, 282 (11th Cir. 1989); *Del E. Webb Constr. v. Richardson Hosp. Auth.*, 823 F.2d 145, 150 (5th Cir. 1987); *American Centennial Ins. v. Nat'l Casualty Co.*, 951 F.2d 107, 108 (6th Cir. 1991); *Government of United Kingdom v. Boeing Co.*, 998 F.2d 68, 74 (2d Cir. 1993); *Weyerhaeuser Co. v. Western Seas Shipping Co.*, 743 F.2d 635, 637 (9th Cir. 1984).

which requires state and federal courts to hold that arbitration agreements are "valid, irrevocable, and enforceable." In so mandating judicially-supervised classwide arbitration, the California court decided an issue which this Court has previously addressed but has never decided. *Keating v. Superior Court*, 31 Cal. 3d 584, 645 P.2d 1192, 183 Cal. Rptr. 360 (1982), *rev'd in part and appeal dismissed in part sub nom., Southland Corp. v. Keating*, 465 U.S. 1, 8-9 & nn. 3-4 (1984) (hereafter *"Keating"*). This case presents this Court with the opportunity to decide that issue and to resolve the classwide abitration issue that has divided the courts of appeals, and now threatens differential results in state court proceedings brought to enforce of arbitration agreements governed by the FAA as written by the parties.

A. The Class Action Proceedings In The Trial Court And Blue Cross's Motion To Compel Arbitration.

Elizabeth Farquhar and Laurie Winett (collectively "Subscribers") are subscribers to petitioners' health insurance plans who filed a class action complaint in the California Superior Court for the County of Los Angeles against Blue Cross of California, CaliforniaCare Health Plans and WellPoint Health Networks (collectively "Blue Cross"). Subscribers complained that Blue Cross's individual health care service plan agreements contained standard form "waiting period" provisions which violated California Health & Safety Code §1357.51. (*See* App. 56-59.) The complaint asserted causes of action for breach

of contract and bad faith on behalf of subscribers, as well as "all others similarly situated." (Opn. at App. 2-4.)

The subscriber agreements each contained broadly worded provisions requiring binding arbitration before and under the rules of the American Arbitration Association ("AAA") of "[a]ny dispute between you and Blue Cross of California and/or its affiliates. . . . " (Opn. at App. 2-4)[3] Accordingly, Blue Cross petitioned the respondent superior court to compel arbitration of the individual disputes raised by the complaint and to *stay all judicial proceedings*, i.e, those relating to the "class action" claims. Blue Cross took the position, and Subscribers agreed, that the arbitration clauses in the subscriber agreements were governed by the FAA. (Opn. at App. 2-3) Blue Cross maintained that the superior court was required to order individual arbitrations and had no authority to proceed with class certification, or other judicially supervised state law procedures, including "classwide arbitration." Blue Cross relied on the arbitration enforcement provisions of the FAA and federal court decisions rendered since *Keating* (*e.g., Champ v. Siegel Trading Co., Inc.*, 55 F.3d 269 (7th Cir. 1995)), arguing that under the comprehensive provisions of the FAA,

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[3] Blue Cross's "Prudent Buyer Plan Service Agreement and Combined Evidence of Coverage and Disclosure Form" further stated that: "Any dispute or claim, of whatever nature, arising out of, in connection with, or in relation to this Agreement or breach thereof, or in relation to care or delivery of care, including any claim based on contract, tort or statute, must be resolved by arbitration if the amount sought exceeds the jurisdictional limit of the small claims court." (Opn. at App. 2-4.)

classwide arbitration was preempted absent an express agreement of the parties authorizing such litigation-based procedures. The AAA Commercial Arbitration Rules which the agreements stipulated would govern the resolution of "any dispute or claim"[4] do not provide for classwide arbitration.

In response to those motions, the superior court entered an order that (i) compelled binding arbitration before the AAA of the individual claims raised by the complaint; (ii) stayed all judicial proceedings as to those individual claims; but (iii) denied the requested stay of the class action proceedings; and (iv) expressly allowed those class claims to proceed in the superior court, including class-related discovery and class certification proceedings. (Opn. at App. 3-4.) According to the superior court, because the FAA did not preclude a future order permitting classwide arbitration of the class claims, class-related discovery and certification proceedings should go forward in the trial court pursuant to the California Supreme Court's decision in *Keating*, 31 Cal. 3d at 608-614, *rev'd on other grounds*, 465 U.S. at 16. (App. 39-42; Opn. at App. 3-4, 26-29.)

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[4] The California courts have long held that such "broad form" arbitration agreements are enforceable according to their terms, encompassing any equitable or legal disputes that would otherwise be justiciable in a court of law. *See generally* Knight, Fannin, et al., CAL. PRAC. GUIDE: ALTERNATIVE DISPUTE RESOLUTION, ¶¶ 5.34-5.36 and Appendix D-57 (Rutter Group 1997).

B. Proceedings In The California Court of Appeal.

Blue Cross filed an original writ proceeding in the court of appeal requesting a writ of mandate, prohibition or other appropriate relief on the grounds that the requested stay of all superior court proceedings was mandated under the FAA. The appellate court considered briefs and heard oral argument of counsel for the parties, and thereafter denied Blue Cross's request for a peremptory writ of mandate on October 6, 1998. (Opn. at App. 34-36.) In so doing, the court of appeal concluded the FAA did not preempt California's judicially crafted rule permitting classwide arbitration. The opinion reasoned that imposing classwide arbitration – although not expressly contemplated in the parties' agreements to arbitrate – was not inconsistent with either California or federal law governing private, contractual arbitration. (Opn. at App. 33-36.)

In making that determination, the court suggested that the writ of mandate proceeding gave rise to a question of "first impression" after *Keating* which the United States Supreme Court had yet to reach. (Opn. at App. 2, 15-18) The opinion also noted that there was no dispute that the FAA applied to the arbitration provisions at issue, that the FAA required both state and federal courts to enforce arbitration agreements according to their terms and that state laws which conflicted with the fundamental purposes of the FAA were preempted. (Opn. at App. 2-5)

The court nonetheless held that California's judicially adopted classwide arbitration rule did not conflict with the legislated policy underlying the FAA of "promoting

arbitration." Instead, the opinion reasoned that, in appropriate cases, classwide arbitration actually furthered the FAA's policy even if not provided for in the arbitration agreement. (Opn. at App. 15-18)

The court of appeal further held that the federal precedents upon which Blue Cross relied were not applicable in state court proceedings. Rather, California's procedural rules governing arbitration – including the *Keating* rule permitting classwide arbitration – should be applied to the enforcement of the health plan arbitration provisions in dispute, unless those state law procedures conflicted with the FAA. As the court of appeal had already concluded no conflict existed, it reasoned in the alternative that California's judicially created classwide arbitration rule was not preempted by federal law. (Opn. at App. 19-26.)

The California Supreme Court denied Blue Cross's petition for discretionary review on January 13, 1999. (App. 43.)

REASONS FOR GRANTING THE WRIT

The decision of the California court in this case effectively denies enforcement of the parties' agreement to arbitrate. Directing unwilling parties to participate in "classwide" arbitration fundamentally alters the terms of their agreement and is inconsistent with Congress' expressed intent embodied in the FAA that arbitration agreements be enforced as written. The petition presents important questions of federal law due to the split between the circuits – the First Circuit expressing the

view that consolidated arbitrations are not preempted where state law permits consolidation of multiple disputes without the parties' consent, while seven other circuits and a majority of states have held that neither consolidation nor classwide arbitration may be ordered consistent with the FAA's enforcement scheme unless the parties so agree.

I.

The Preemption Issue Left Open By This Court In *Keating* Is Now Well-Framed For Resolution.

A. Purpose And Scope Of The FAA.

The FAA created a body of federal substantive law on the question of arbitrability that preempts contrary state law or policies under Article VI, Clause 2 of the United States Constitution. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Keating*, 464 U.S. at 12.

Moreover, the mandates of the FAA have been broadly interpreted in requiring that any "contract evidencing a transaction involving interstate commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable. . . . " 9 U.S.C. §2. "Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding *any* state substantive or procedural policies to the contrary." *Perry v. Thomas*, 482 U.S. 483, 490 (1987); *Southland Corp. v. Keating*, 465 U.S. at 11-12; *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270-72 (1995).

As this Court has explained on many occasions, the "enforcement of private agreements to arbitrate . . . according to their terms" means just that – the parties, not the courts or legislative bodies, are entitled to agree to arbitrate and to select the procedures and remedies available to them when they do so. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995). The parties themselves confer jurisdiction on the arbitrator, and when they have selected the procedures that will govern their private arbitration proceedings, the FAA compels the courts to respect the terms of their agreement. *Ibid; see also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) ("the arbitrability of the merits of a dispute depends upon whether the parties *agreed to arbitrate* that dispute") (emphasis added.) The parties themselves appoint "who" will resolve their dispute, and they alone retain the right to define the rules of procedure and discovery (if any) that will govern the arbitration process by the terms of their agreement. *See Kaplan*, 514 U.S. at 943-44.

Subscribers and Blue Cross contracted for the benefits of private arbitration of "any" disputes arising out of the health plan pursuant to the AAA Commercial Arbitration Rules. Those rules do not provide for classwide arbitration, and the majority of the federal courts of appeals have held that such arbitration cannot be imposed by the courts in these circumstances. *See, e.g., Champ*, 55 F.3d at 274-77. The California court of appeal nonetheless upheld classwide arbitration, nothwithstanding great weight of authority interpreting the FAA as preempting such arbitration unless it is specifically provided for in the arbitration agreement. *Ibid.* In so doing,

the court of appeal ignored the fundamental principle that state law is preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," which it sought to achieve in the FAA. *See Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford, Jr. Univ.*, 489 U.S. 468, 477 (1989).

B. Since *Keating*, An Established And Well Reasoned Majority Of Federal Court Decisions Have Held That Class Litigation Procedures Conflict With And Are Preempted By The FAA.

This Court's decision in *Keating* upheld Southland's challenge that the California Franchise Investment Law conflicted with section 2 of the FAA, and thus violated the Supremacy Clause, 465 U.S. at 9 & n. 4. Regarding the precise constitutional question presented here – "whether superimposing class-action procedures on contract arbitration was contrary to the [FAA]" – this Court dismissed Southland's appeal because the franchisor had not properly opposed class arbitration procedures "on federal grounds in the California Supreme Court." *Southland Corp. v. Keating*, 465 U.S. at 8-9 & nn. 3-4.

In the more than 15 years since, a number of federal Circuit Court decisions have considered and squarely addressed the preemption issue. Recently, the Seventh Circuit in *Champ*, 55 F.3d 269 held: "Since the parties' arbitration agreement does not expressly provide for class arbitration, the district court correctly concluded that it was prohibited from reading such a procedure into those arbitration agreements." *Id.* at 277. Requiring an express agreement of the parties evidencing a manifest intent to participate in classwide arbitration, the *Champ*

court viewed the issue as one of strict contract interpretation. According to *Champ*, strict construction of the contract is the only outcome that is consistent with the mandates of the FAA. 55 F.3d at 274-77, *citing Volt*, 489 U.S. at 478 ("[The] FAA requires courts to enforce privately negotiated agreements to arbitrate like other contracts, *in accordance with their terms*.")(emphasis added).)

The *Champ* court likewise refused to recognize classwide arbitration in the absence of a federal statutory basis or express agreement authorizing that procedure. 55 F.3d at 274-75. In addition to *Champ*, the Circuit Courts of Appeals and district courts in at least six other Circuits (including the Ninth Circuit) have confronted the same issue in the context of continuing multiple arbitrations arising under separate agreements, reaching the same conclusion.[5]

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[5] The Courts of Appeals decisions are cited at note 2 *supra*; *see also Randolph v. Green Tree Fin. Corp.*, 991 F.Supp. 1410, 1423-24 (M.D. Ala. 1997) (under FAA, court can only enforce arbitration agreement as parties wrote it and agreement in issue made no provision for class action treatment); *Howard v. Klynveld Peat Marwick Goerderler*, 977 F.Supp. 654, 665, n. 7 (S.D.N.Y. 1997) (a plaintiff who has agreed to arbitrate all claims arising out of her employment may not avoid arbitration by pursuing class claims – such claims must be pursued in non-class arbitration); *Gammaro v. Thorp Consumer Discount Co.*, 828 F.Supp. 673, 674 (D. Minn. 1993) (under §4 of the FAA, court is required to give effect to parties' arbitration agreement, and the agreement in issue made no provision for classwide arbitration); *accord McCarthy v. Providential Corp.*, 1994 U.S. Dist. LEXIS 10122 at *7-*9, 1994 WL 387852 at *2-*3 (N.D. Cal. 1994) (under §2 of the FAA, absent provision authorizing classwide arbitration, court had no authority to order arbitration to proceed as a class action under state or federal law).

Based upon this substantial body of authority, the opinion cannot be reconciled with the fundamental principle that arbitration clauses will be enforced strictly according to their terms. Absent an express agreement providing for classwide arbitration, a court interpreting an arbitration agreement which is subject to the FAA has no authority to compel such a procedure to go forward in arbitration. Despite these significant developments in the case law interpreting the preemptive effect of the FAA since the time *Keating* was decided, the court of appeal opted to superimpose California's "classwide arbitration" doctrine upon the arbitration provisions of the Blue Cross health plan contracts.

C. A Small Minority Of Contrary Circuit Court And State Court Decisions (Like The California Court Of Appeal In This Case) Have Nevertheless Approved Classwide Arbitration.

Only the First Circuit has held that a district court may order consolidated arbitration, even though such action is not expressly authorized in the parties' agreement, and then only where underlying state arbitration law specifically authorizes consolidated arbitration. *See New England Energy*, 855 F.2d at 5. Even so, *Champ* concluded that in light of the past decade of case law uniformly interpreting the FAA, "we need not determine whether we would follow the First Circuit's holding, although we have our doubts about its continued validity." *Champ*, 55 F.3d at 275, n. 5 (*see also* note 9 *infra*).

The California court of appeal appears to be the first state court to follow the minority view of the First Circuit

as authorizing an even more extreme form of consolidation – "classwide arbitration." Before the present case, at least two other intermediate California appellate courts in *Izzy v. Mesquite Country Club*, 186 Cal. App. 3d 1309, 1318-1322, 231 Cal. Rptr. 315, 319-22 (1986) and *Lewis v. Prudential Bache-Securities, Inc.*, 179 Cal. App. 3d 935, 938, 945-46, 225 Cal. Rptr. 69, 70-71, 75-76 (1986), had reached the same conclusion.

Apart from the California cases, apparently only the Pennsylvania Superior Court's Appellate Division has ruled that an arbitration agreement enforceable under the FAA may be interpreted to include classwide arbitration. *Dickler v. Shearson Lehman Hutton, Inc.*, 408 Pa. Super. 286, 596 A.2d 860, 862-63 (1991), *appeal denied*, 532 Pa. 663, 616 A.2d 984 (1992).

In other states, even where the courts have interpreted arbitration agreements that are not necessarily controlled by the enforcement provisions of the FAA, many cases have found that ordering "consolidation" of arbitrations arising out of separate contracts and separate disputes amounts to an impermissible rewriting of the parties' arbitration agreement. For example, the Washington Supreme Court in *Balfour, Guthrie & Co., Ltd. v. Commercial Metals Co.*, 93 Wash.2d 199, 203, 607 P.2d 856, 858 (1980) stated the rule as follows:

> It appears that the [American] Arbitration Association has had a long-established policy of ***not approving consolidation without the written consent of all parties***. We believe that one entering into a contract such as the one at issue here would reasonably expect that consolidation could only take place with such written consents. . . . If the parties wish to provide for the

> possibility of consolidated arbitration in their contracts, the courts will, of course, give effect to their decision. If the parties to separate contracts all consented to consolidated arbitration, the arbitral award would be subject to judicial confirmation and enforcement. ***But however sound they may consider consolidated arbitration to be as a matter of policy, courts are not empowered to direct parties to undertake it when one of them objects.*** *(Citing Consolidated Pacific Engineering, Inc. v. Greater Anchorage Area Borough,* 563 P.2d 252, 255 (Alaska 1977)).[6]

The court of appeal's published opinion in the present action chose to embrace the reasoning of *Dickler* and the First Circuit's questioned minority view in *New England Energy,* eschewing the overwhelming weight of authority to the contrary. (*See* notes 2, 6 *supra* and accompanying text; *Champ,* 55 F.3d at 275, n. 2.) The court of

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[6] *Accord Board of Education v. Midwest Electric Co.,* 1 Ohio App.3d 37, 38-39, 439 N.E.2d 425, 427 (1980) (parties to separate arbitration agreements under AAA rules did not consent to "consolidation" of arbitration where their agreements contained no language approving of that procedure); *Bay County Bldg. Authority v. Spence Bros.,* 140 Mich. App. 182, 187, 362 N.W.2d 739, 741 (1984) (where separate arbitration contracts were silent on the subject of consolidation "the courts may not alter the arbitration terms the parties have inserted in their contract"); *Stop & Shop Cos. v. Gilbane Bldg. Co.,* 364 Mass. 325, 329, 304 N.E.2d 429, 432 (1973); *Pueblo of Laguna v. Cillessen & Son, Inc.,* 101 N.M. 341, 344, 682 P.2d 197, 200 (1984); *see generally* Annot., *State Court's Power to Consolidate Arbitration Proceedings,* 64 A.L.R. 3d 528 (1975) at §4 (digesting cases); *but see contra id.* at §3 (digesting intra-state arbitration contract cases ordering "consolidation in absence of showing of prejudice").

appeal's justification for classwide arbitration is essentially two-fold: (1) compelling individual arbitration would be unfair to individuals "bound by *adhesion form contracts* to arbitration agreements"[7] and, (2) because "consolidating two arbitrations" would not be inconsistent with the FAA, classwide arbitrations likewise should not be prohibited.[8] A significant number of jurisdictions applying the FAA have rejected both of these propositions.

Regarding the "adhesion contract" rationale offered by the opinion, the Ninth Circuit (like most other circuits) has held to the contrary: "State law adhesion principles may not be invoked to bar arbitrability of disputes under the [Federal] Arbitration Act." *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932, 934 (9th Cir. 1991) (brackets in original); *Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282, 285 (9th Cir. 1988). Moreover, adding a "consolidation" term where the parties have not agreed to it violates the rule placing arbitration agreements "on equal footing" with other contracts. *Champ*, 55 F.3d at 275;

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[7] Opn. at App. 15-18 & n. 5; *citing Dickler*, 596 A.2d at 867 (emphasis added).

[8] Opn. at App. 23-26; *citing New England Energy*, 855 F.2d at 3 (emphasis added). The logic behind this justification for the *Keating* rule calls to mind Judge Learned Hand's comparison between indemnity and contribution: "[Classwide arbitration] is only an extreme form of [consolidation]." *Slattery v. Marra Bros.*, 186 F.2d 134, 138 (2d Cir. 1951). The fundamental difference is that, here, the parties to the arbitration contracts did not agree to "consolidation" or the even more extreme "class" procedure.

Weyerhaeuser Co. v. Western Lines Shipping Co., 743 F.2d at 637.

The court of appeal's alternative basis for distinguishing *Champ* and numerous other post-*Keating* decisions – on the ground that the California Arbitration Act permits "consolidation" of arbitrations whereas federal law does not – is entirely beside the point. (*Cf.* Opn. at App. 23-26) The only issue is whether *these parties agreed* to incorporate litigation-based "classwide" procedures in their private arbitration agreements.[9] Not even respondents contend that they did.

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[9] The First Circuit in *New England Energy* similarly reasoned that Massachusetts consolidated arbitration statute, Mass. Gen. Laws Ann. ch. 251, §2A (App. 60-61), should be given precedence in a case within the purview of the FAA. 855 F.2d at 5. However, *New England Energy*'s majority opinion apparently failed to consider the views of the Massachusetts courts on the subject. Nowhere is any mention made of the Massachusetts Supreme Judicial Court's limitation upon consolidating arbitrations without the consent of all parties. *Stop & Shop Cos. v. Gilbane Bldg. Co.*, 364 Mass. at 329, 304 N.E.2d at 432. That rule continued to be followed after the enactment of Massachusetts Uniform Arbitration Act §2A in 1977. *See, e.g., Town of Danvers v. Wexler Constr. Co.*, 12 Mass. App. Ct. 160, 166-67, 422 N.E.2d 782, 786 (1981) (courts should not "disregard the method specifically chosen by the parties to settle all their disputes and which would judicially rewrite their contract for them. . . . [A] court may not order consolidated arbitration without an agreement therefor, even though it would result in more efficient management of the case") [*citing Stop & Shop Cos.*; footnote and other internal citations omitted]); *CRS Sirrine Engineers, Inc. v. Aetna Casualty & Surety Co.*, 1997 U.S. Dist. LEXIS 3449 at *10-*12, 1997 WL 136335 at *4 (D. Mass. 1997) (Mass. Uniform Arbitration Act §2A "may not be exercised to vary the parties' agreements").

The public policies articulated in *Champ* and similar cases of upholding the right of the parties to specify the procedures that will govern any dispute (in this case, the Commercial Arbitration Rules of the AAA), dictate that giving priority to their freedom to contract is the only outcome which comports with the "full purposes and objectives of Congress" when enacting the FAA. (Opn. at App. 10; *citing Volt*, 439 U.S. at 477.)

II.

The California Court Of Appeal's Rewriting of the Parties' Private Arbitration Agreements Is Contrary To The Mandate Of The FAA Prohibiting Any Impediments To Enforcement Of Contracts According To Their Terms.

At first blush, the court of appeal does not appear to take issue with the basic premise that the FAA requires *both* the state and federal courts to enforce the parties' agreements to arbitrate *according to their terms*. (Opn. at App. 9-12.) The opinion acknowledges that this Court has delineated the scope of section 2 preemption as placing "arbitration agreements on an equal footing with contracts generally." (Opn. at App. 10-11; *citing Allied-Bruce*,

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The dissent of Judge Seyla in *New England Energy* is on the mark: "Both [of the separate arbitration agreements involve somewhat different parties,] contain arbitral clauses and are, concededly, subject to the Act. *** [¶] The Federal Arbitration Act necessitates that we enforce the parties' bargain as they wrote it – nothing more. Neither the language of the statute nor the decisions of the Supreme Court leave the door ajar for reshaping the bargain based on state law." 855 F.2d at 9-10 (Seyla, J., dissenting) (brackets added); *accord Champ*, 55 F.3d at 277.

513 U.S. at 270-71.) "Thus, generally applicable contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening §2." *Doctors' Associates, Inc. v. Casarotto*, 517 U.S. 681, 684-85 (1996) (hereafter "*Doctors' Assocs.*") (internal citation omitted). On the other hand, "any state law that invalidates the express terms of an arbitration agreement is preempted by the act. . . . Also, ***a state law requiring judicial consideration of a claim contrary to the parties' agreement to arbitrate that claim*** directly conflicts with the [FAA] and violates the Supremacy Clause." (Opn. at App. 11 (emphasis added).)

Nevertheless, according to the California court of appeal, "the United States Supreme Court has repeatedly indicated that sections 3 and 4 of the [FAA] do not apply in state courts." (Opn. at App. 26-27.) On that basis, the court disagreed with "the reasoning of the federal circuit court decisions [such as *Champ*] on classwide and consolidated arbitrations [which] turns on section 4 of the [FAA]." (Opn. at App. 26-27 (bracketed text added)).

The court of appeal's analysis in this regard is flawed. That court wrongly assumed that the classwide arbitration issue turns on the applicability of §4 of the FAA to state court proceedings. However, this Court in *Volt* left open the question whether "§§3 and 4 of the FAA are fully applicable in state-court proceedings," 489 U.S. at 477, but nonetheless held, in a case decided solely under §2 of the FAA as it applied to state court proceedings, that the Act "simply requires courts to enforce privately negotiated agreements to arbitrate, like other

contracts, ***in accordance with their terms.***" *Id.* at 478 (emphasis added).

Thus, under either §2 or §4 of the FAA, the question properly should have been phrased as a simple matter of contract interpretation: "The plain meaning of the contractual language here indicates that the parties did not contemplate consolidated arbitration." *Pueblo of Laguna v. Cillessen & Son, Inc.*, 101 N.M. at 344, 682 P.2d at 200. As the Massachusetts Supreme Judicial Court aptly stated, "arbitration, once undertaken, should continue freely without being subjected to a judicial restraint which would tend to render the proceedings neither one thing nor the other, but transform them into a hybrid, part judicial and part arbitrational." *Stop & Shop Cos. v. Gilbane Bldg. Co.*, 364 Mass. at 329, 304 N.E.2d at 432 (*see also* notes 6 and 9 *supra* and accompanying text).

The court of appeal has profoundly changed the nature and the scope of the parties' agreement to arbitrate in the following material respects:

Judicial Supervision Imposed Over The Arbitrator's "Jurisdiction." By the terms of their private agreement, the arbitrator's "jurisdiction" is limited to that granted by the parties, whereas the "classwide arbitration" rule applied by the court of appeal seemingly has no limits. Under the AAA Commercial Rules, the arbitrator "shall have the power to rule on his or her jurisdiction" including any objections to the nature and scope of the dispute to be resolved privately between the parties. (AAA Commercial Arbitration Rules, §R-8(a)-(c) [App. 64-65]; *Kaplan*, 514 U.S. at 943-44 ("a court must defer to an

arbitrator's arbitrability decision when the parties submitted that matter to arbitration").)

The changes in the basic terms of the agreement to arbitrate are so fundamental that, before ordering classwide arbitration, the California courts propose the following "option" be offered to the non-consenting party: "Whether classwide proceedings would prejudice the legitimate interests of the party who drafted the adhesion agreement must also be considered, and *that party should be given the option of remaining in court rather than submitting to classwide arbitration.*" *Keating*, 31 Cal. 3d at 613-614 (emphasis added). (*See also* Opn. at App. 16-18.)

In the present action, a court has overridden the procedure of arbitration for resolving individual disputes arising under Blue Cross health service plans with considerable judicial involvement; including, the superior court's administration and oversight of class certification, definition of the scope of the class membership and issues, notification to potential class members and classwide discovery, and who will bear the ultimate costs and other financial burdens of this non-consensual *judicial* process. *Cf. Mastrobuono*, 514 U.S. at 58.

The "Classwide" Rule Fundamentally Alters The Rules Of Procedure Stipulated By The Contract. The substantial weight of well-reasoned authority recognizes that such "class" procedures are not contemplated by private arbitration agreements. Here, the parties selected a private forum for resolution of their disputes: The American Arbitration Association. They specified the AAA Commercial Arbitration Rules as the procedures to govern

that process. Under the FAA, the agreements are enforceable according to their terms. *See Rainwater v. Nat'l Home Ins. Co.*, 944 F.2d 190, 193 (4th Cir. 1991) (identification of "AAA rules" was all that was required under the FAA to specify the intent to arbitrate and the applicable procedures sufficient to enforce the parties' right to compel binding arbitration of all disputes under their contract).

The California court of appeal itself correctly observed, "There has been no finding in the present case that the parties expressly agreed to incorporate California's arbitration rules into their agreements. Contrary to plaintiffs' assertion, *Volt* does not compel this court to conclude that by virtue of the choice-of-law provision in the underlying health insuring agreements the parties agreed California's classwide arbitration rule would govern this case." (Opn. at App. 30, n. 8; *accord Mastrobuono*, 514 U.S. at 58-60 & n. 4.) Here, unlike *Volt*, the parties did not agree the California Arbitration Act would govern. Instead, they specified the AAA's Commercial Arbitration Rules. The FAA requires their agreement be honored. *Doctors' Assocs.*, 517 U.S. at 688 (state procedures allowed, provided that "applying the state rule would not 'undermine the goals and policies of the FAA' " governing enforcement of contracts generally).[10]

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[10] What the opinion characterizes as a "concession" by Blue Cross at oral argument – that a "consolidated arbitration" under state law would be allowable in a case within the purview of the FAA – is not a concession at all. (Opn. at App. 25, n. 6.) The parties *may agree* to adopt state-based procedures (including consolidation or classwide arbitration) *if their agreement so provides*; but in the absence of such an agreement, they do not have to set forth in the negative each of those procedures to

Selection Of Arbitrators. Each member of the as-yet undefined "class" of contestants has entered into a separate agreement with Blue Cross. Under the AAA's stipulated method of selection, each party is entitled to review a list of approved arbitrators, each may "strike" the name of any arbitrator who is deemed unacceptable and then list in order of preference the remaining candidates available for selection. (AAA Commercial Arbitration Rules, §§R-4, R-13 to R-15, R-17 [App. 63-67].) By definition, because each separate dispute entails a different method for selecting the arbitrator(s), the California courts may not provide "a different standard of reference than these parties agreed to, and [that standard] may not be used to change the rules which the parties stipulated should apply" to the selection of their decision-maker. *See, e.g., CRS Sirrine Engineers, Inc.*, 1997 U.S. Dist. LEXIS 3449 at *10-*12, 1997 WL 136335 at *4; *Doctors' Assocs.*, 517 U.S. at 684-85; and discussion at notes 6-9 *supra*.

Binding Adjudication Of "Claims" On Behalf Of Absent Class Members. By expanding the scope of these individual disputes to encompass a "class," the California courts have lost sight of the fact that the parties who were actually before them *did not* agree, implicitly or explicitly, that different procedures *"requir[ing] a judicial forum for the resolution of claims"* could be imposed without their consent. (Opn. at App. 10-12 (italics in original).)

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which they have *not agreed*. *Mastrobuono*, 514 U.S. at 58; AAA Commercial Arbitration Rules §R-1 ("The parties, by written agreement, may vary the procedures set forth in these rules.") (Opn. at App. 10-12.)

Although touted as a rule of fairness for class litigants, including defendants, the doctrine that class members (e.g., those who do not "opt out" after notice of the proceedings) may be bound by a final judgment, further demonstrates just how fundamentally California's classwide rule alters the fabric of the contract. Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D §1789 *et seq.* (West's 1986 & 1999 supp.). Whether or not absent class members actually "consented" to participate, they are required to have their claims first defined by a judge in a judicial forum, then adjudicated and determined by an arbitrator whom they did not participate in selecting.

Blue Cross's right to arbitrate individual claims arising under its health plans with only those Subscribers who have actually lodged complaints likewise is effectively thwarted. This incongruous result cannot be reconciled with the FAA requiring enforcement of the parties' agreed procedures.[11]

"Discovery" Regarding Classwide Issues And Class Certification. The court of appeal has added another material term to agreements before it; an implicit agreement to participate in "discovery" for the purpose of defining the scope of the issues and membership of the classwide arbitration – including judicial supervision of

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[11] It makes no difference whether the right to arbitrate is defined as "substantive" or "procedural" under the FAA. *Perry v. Thomas*, 482 U.S. at 490. Contrary to the court of appeal's analysis, the FAA requires the parties to proceed "in accordance with the terms" of the agreement to arbitrate as written. (*Cf.* opn. at App. 26-29.)

class discovery procedures and ultimately class certification "if appropriate" as ordered by the superior court. These "discovery" proceedings are ostensibly imposed by analogy to the rules governing "consolidation" of separate arbitrations under California Code of Civil Procedure §1281.3. (Opn. at App. 21-26.) However, even as a threshold matter, "discovery" fundamentally conflicts with the FAA by contravening the contract *as written*.

The AAA Commercial Arbitration Rules authorize the arbitrator to require informal "exchanges of information" and "witness lists," but not formal "discovery" as respondent superior court contemplates in connection with the classwide arbitration procedures it has crafted. *Cf.* AAA Commercial Arbitration Rules, §R-23 (App. 67).[12]

III.

The Potential For "Differential Results" In State And Federal Courts Applying The FAA Will Continue To Exist If The California Court Of Appeal's Published Decision Is Allowed To Stand.

Federal and state courts have concurrent jurisdiction under the "substantive rule" of enforcement created by the FAA which is "applicable in state as well as federal courts." *Southland Corp. v. Keating*, 465 U.S. at 15-16. However, the FAA does not enlarge federal court subject matter jurisdiction. Unless a "federal question" or "diversity

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[12] "Discovery on the subject matter of the dispute to be arbitrated generally has been denied." *Balfour, Guthrie & Co., Ltd. v. Commercial Metals Co.*, 93 Wash. 2d at 203-204, 607 P.2d at 858 (internal citations and quotation marks omitted).

of citizenship" is established, a petition to compel enforcement of the arbitration contract cannot be filed in a federal court. *Id.* at 16, n. 9. Consequently, the overwhelming majority of arbitration enforcement proceedings, as in this case, are conducted by state courts. *Id.* at 16, n. 8.

The court of appeal recognized that the FAA "preempts state anti-arbitration law so as to prevent state and federal courts from *reaching different results about the validity and enforceability of arbitration agreements* in similar cases." (Opn. at App. 10-11; *citing Allied-Bruce*, 513 U.S. at 271-72 (emphasis added).) However, the court of appeal's opinion creates the obvious potential for such differential outcomes in state and federal courts by superimposing California's classwide arbitration procedure on the private agreements of the parties. *Cf. Southland Corp. v. Keating*, 465 U.S. at 8-9 & fns. 3-4. (Opn. at App. 34-36.)

If the Subscribers had filed suit down the block from the Los Angeles Superior Court in a federal district court for the Central District of California, the district judge hearing the motion to compel arbitration would have been bound to follow *Champ* (and the earlier Ninth Circuit precedent upon which *Champ* based its sound rationale), in rejecting any notion of classwide arbitration. (*See, e.g.*, notes 2-9 *supra* and accompanying text.) By contrast, under the result reached by the California court of appeal, those same parties are being ordered to proceed with class-related discovery in the superior court, and to go forward with a class certification motion in that court, all with an eye toward an ultimate order directing a classwide arbitration – an outcome manifestly different

than the purely private arbitration of individual claims before the AAA contemplated by their agreements.

Such fundamental differences in the outcome of the petitioners' hypothetical motions to compel arbitration, depending upon whether Subscribers' class action claims were brought in state or federal court, illustrate the essential problems with the decision below and underscore the reasons why this Court should grant the relief prayed for in this petition.

CONCLUSION

The kind of coercive renegotiation of the parties' right to arbitrate that occurred here evidences the "judicial hostility to arbitration agreements" that the FAA was intended to remedy. (Opn. at App. 6; *see also* notes 5-9 *supra* and accompanying text.) The California court's opinion presents litigants who wish to avoid arbitration obligations with an unbargained-for expedient – they can merely file a complaint in state court pleading "class action" claims and thereby circumvent the process of a quick and economical individual arbitration on the merits of any dispute – the remedy which the parties had originally bargained to receive. To permit *any* state or "federal court to read a classwide arbitration term into the parties' agreement would 'disrupt the negotiated risk/benefit allocation and direct the parties to proceed with a different sort of arbitration.' " (Opn. at App. 21; *citing Champ*, 55 F.3d at 274-77 (internal brackets omitted).)

The majority of circuits and other states applying the FAA have rejected California's judicially-imposed procedures. This wholesale judicial intervention makes the role of the arbitrator, to whom the parties have conferred jurisdiction to hear and decide their dispute, a mere appendage of the litigation process. That outcome is inconsistent with the FAA, and this Court's precedents. This Court should resolve the questions left unanswered by *Keating*.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 1999

APPENDIX A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

BLUE CROSS OF CALIFORNIA et al., Petitioners, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; ELIZABETH FARQUHAR et al., Real Parties in Interest.	No. B122446 (Super. Ct. No. BC179834) (Filed Oct. 06, 1998)

ORIGINAL PROCEEDING. Petition for writ of mandate. Bruce E. Mitchell, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Petition denied.

Ginsburg, Stephan, Oringher & Richman and Gordon E. Bosserman, Terrence M. King, and Gerald J. Miller for Petitioners.

Ivie, McNeill & Wyatt, Inc., Barry Reed and Jay R. Taylor for Real Parties in Interest.

I. INTRODUCTION

This original writ proceeding presents a question of first impression: whether a California court can, as authorized by state law, order classwide arbitration in a case that falls under the Federal Arbitration Act (the act). (9 U.S.C.A. § 1 et seq.) Stated differently, the issue is whether the act preempts California decisional authority authorizing classwide arbitration. The United States Supreme Court has never reached the question whether the act precludes classwide arbitration under state law. We conclude application of the California classwide arbitration rule is not preempted by the act. Accordingly, we deny the writ petition.

II. BACKGROUND

Two named plaintiffs, Elizabeth Farquhar, and Laurie Winett, brought this class action, against Blue Cross of California and Wellpoint Health Networks, Inc. (collectively, Blue Cross). They alleged Blue Cross had "engaged in a widespread practice of selling and administering health plans which violate laws concerning pre-existing condition exclusions, waiting period exclusions, waivered condition exclusions, and temporary exclusions." Blue Cross answered the complaint alleging, in part, that plaintiffs were required by contract to resolve their claims through binding arbitration.

The arbitration provision in Blue Cross's "Personal Prudent Buyer Classic and Basic Hospital Plan for Families and Individuals" stated: "Any dispute between you and Blue Cross of California and/or its affiliates must be resolved by binding arbitration, if the amount in dispute

exceeds the jurisdictional limit of the Small Claims Court. Any such dispute will be resolved not by law or resort to court process, except as California law provides for judicial review of arbitration proceedings. Under this coverage, both you and Blue Cross of California and its affiliates are giving up the right to have any dispute decided in a court of law before a jury." A more extensive arbitration clause was included in Blue Cross's "Prudent Buyer Plan Service Agreement and Combined Evidence of Coverage and Disclosure Form." It stated: "PART VII BINDING ARBITRATION [¶] A. Any dispute or claim, of whatever nature, arising out of, in connection with, or in relation to this Agreement or breach thereof, or in relation to care or delivery of care, including any claim based on contract, tort or statute, must be resolved by arbitration if the amount sought exceeds the jurisdictional limit of the small claims court [¶] B. Any disputes regarding a claim for damages within the jurisdictional limits of the small claims court will be resolved in such court. [¶] C. The arbitration is begun by the Member making written demand on Blue Cross. The arbitration will be conducted by the American Arbitration Association according to its commercial rules of arbitration. The arbitration shall be held in the state of California. [¶] D. The Member and Blue Cross agree to be bound by the arbitration provision and acknowledge that they are giving up their right to a trial by court or jury. [¶] E. The arbitration findings will be final and binding except to the extent that California or Federal law provide for the judicial review of arbitration proceeding."

Blue Cross filed a petition in the trial court to compel arbitration of the individual plaintiffs' claims and to stay

the litigation. It argued in part that the act preempted California law as to classwide arbitration. Plaintiffs opposed the petition. They did not dispute that their arbitration agreements were contained in contracts evidencing a transaction involving commerce and therefore within the purview of the act. They argued, however, that California's procedural law concerning the conduct of arbitration was not preempted by the act. The respondent court granted Blue Cross's petition to compel arbitration and to stay judicial proceedings *as to the individual plaintiffs,* but denied its motion to stay the litigation as a whole. The trial court ordered in part: "The Motion to Stay Judicial Proceedings is denied as to the class claims alleged in the Complaint. Discovery shall continue as to the class claims for purposes of a possible class certification motion and, . . . if a class is certified, the class claims will be referred to class-wide arbitration. . . . " The trial court also concluded that "[t]he arbitration provision in issue is one of adhesion, drafted by [Blue Cross]."

Blue Cross then filed the present petition for a writ of mandate, prohibition or other appropriate relief. Blue Cross contends the act preempts California law allowing for classwide arbitration, therefore the respondent court erred in denying the motion to stay the judicial action as a whole. We issued an order to show cause why the relief prayed for in the petition should not be granted. Blue Cross has not raised any issue in its petition specifically concerning the respondent court's limited discovery order or its finding the arbitration provision was one of adhesion. We do not address those issues because they have not been raised. The sole question before us is

whether the act prohibits classwide arbitration in this case.

III. DISCUSSION

A. Ripeness

The parties have not raised any question as to this writ proceeding being premature and we do not conclude that it is. Blue Cross's position is that binding arbitration of individual claims was mandated by contract and the act precludes arbitration of class claims under state law; therefore the respondent court should have stayed the *entire* litigation. Plaintiffs do not claim they are entitled to litigate the class claims in a court action. They assert only that they may arbitrate those claims. To allow discovery to proceed as to the existence of a class if classwide arbitration is not allowed would waste judicial resources and burden the parties with unnecessary expense of time and money. In addition, to defer a decision on this issue would result in "lingering uncertainty in the law." (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 170.) Therefore, whether the trial court erred in refusing to stay the litigation is an issue that is ripe for resolution. This case does not present an "abstract difference[ ] of legal opinion" for resolution, nor will it result in our issuing a "purely advisory opinion[ ]." (*Pacific Legal Foundation v. California Coastal Com., supra,* 33 Cal.3d at p. 170; accord *Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 230.) The present case involves concrete issues – may discovery proceed on whether there should be class certification

with the potential that plaintiffs will later be joined in classwide arbitration.

B. The Federal Arbitration Act

The parties agree that the underlying health insurance contracts evidence transactions involving commerce and therefore the arbitration provisions fall within the purview of the act. The act was enacted in 1925 (43 Stat. 883) and codified in 1947. (61 Stat. 669.) It provides in section 2 that a written arbitration provision in a contract "evidencing a transaction involving commerce . . . *shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.*" (9 U.S.C.A. § 2; italics added.) Section 4 of the act provides for a petition to compel arbitration in "any United States district court" and for the issuance of an order "directing the parties to proceed to arbitration *in accordance with the terms of the agreement.*" (9 U.S.C.A. § 4; italics added.)

The purpose of the act "was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts." (Domke on Commercial Arbitration (Rev. ed. 1997) Chapter 4: Statutory Arbitration Law, § 4.04, p. 6, fn. omitted; *Allied-Bruce Terminix Cos. v. Dobson* (1995) 513 U.S. 265, 270-271; *see Kulukundis Shipping Co. v. Amtorg Trading Corp.* (2d Cir. 1942) 126 F.2d 978, 982-985 [tracing the history of the judicial attitude towards arbitration that led to the enactment of the act]; H.R.Rep. No. 96, 68th Cong., 1st Sess., p. 1 (1924); Sen.Rep. No. 536, 68th Cong., 1st Sess., p. 2 (1924).) A 1924 Senate Report described the "old law": "But it is

very old law that the performance of a written agreement to arbitrate would not be enforced to equity, and that if an action at law were brought on the contract containing the agreement to arbitrate, such agreement could not be pleaded in bar of the action; nor would such an agreement be ground for a stay of the proceedings until arbitration was had. Further, the agreement was subject to revocation by either of the parties at any time before the award. With this as the state of the law, such agreements were in large part ineffectual, and the party aggrieved by the refusal of the other party to carry out the arbitration agreement was without adequate remedy [¶]. Until recently in England, and up to the present time in nearly, if not quite all, the States of the Union, such has been the law in regard to arbitration agreements. The Federal courts have in the main been governed by the same rules and, as a consequence, have denied relief to the parties seeking to compel the performance of executory agreements to settle and determine disputes by arbitration." (Sen.Rep. No. 536, 68th Cong., 1st Sess., p. 2 (1924).) A 1924 House Report explained the effect of the legislation as follows: "Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement. He can no longer refuse to perform his contract when it becomes disadvantageous to him. an arbitration agreement is placed upon the same footing as other contracts, where it belongs." (H.R.Rep. No. 96, 68th Cong., 1st Sess., p. 1 (1924).)[1]

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[1] Two identical bills made their way through the 68th Congress, Senate Bill No. 1005 and House Bill No. 646. During

The United States Supreme Court has described the Congressional purpose in adopting the act as follows: "American courts initially followed English practice, perhaps just " 'stand[ing] . . . upon the antiquity of the rule" ' prohibiting arbitration clause enforcement, rather than " 'upon its excellence or reason.' " [Citation.] Regardless, when Congress passed the Arbitration Act in 1925, it was 'motivated, first and foremost, by a . . . desire' to change this antiarbitration rule. [Citation.] It

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Congressional debate, Senator Thomas J. Walsh of Montana, a member of the Senate Committee on the Judiciary, stated that "the bill [Senate Bill No. 1005] provides for the abolition of the rule that agreements for arbitration will not be specifically enforced." (Remarks of Senator Walsh, 66 Cong. Rec. 984 (1924).) Congressman George S. Graham of Pennsylvania, the Chairman of the House Committee on the Judiciary, elaborated on the purpose of the legislation: "This bill [House Bill No. 646] simply provides for one thing, and that is to give an opportunity to enforce an agreement in commercial contracts and admiralty contracts – an agreement to arbitrate, when voluntarily placed in the document by the parties to it. It does not involve any new principle of law except to provide a simple method by which the parties may be brought before the court in order to give enforcement to that which they have already agreed to. It does not affect any contract that has not the agreement in it to arbitrate, and only gives the opportunity . . . of asking the parties to come in and carry through, in good faith, what they have agreed to do. It does nothing more than that. It creates no new legislation, grants no new rights, except a remedy to enforce an agreement in commercial contracts and in admiralty contracts." (Remarks of Congressman Graham, 65 Cong. Rec. 1931 (1924).) As similarly stated by Congressman Graham on another occasion, "The result of [House Bill No. 646] is that if you and I agree in the contract to arbitrate we must arbitrate and can not shirk it afterwards." (Remarks of Congressman Graham, 66 Cong. Rec. 3004 (1925).)

intended courts to 'enforce [arbitration] agreements into which parties had entered,' [citation; footnote omitted], and to 'place such agreements "upon the same footing as other contracts.' " [Citation.]" (*Allied-Bruce Terminix Cos. v. Dobson, supra,* 513 U.S. at pp. 270-271.) In *Perry v. Thomas* (1987) 482 U.S. 483, 490, the United States Supreme Court held: " '[T]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered. . . . ' [Citation.]" The high court has similarly explained that the "'primary'" of the act was to ensure ' "that private agreements to arbitrate are enforced according to their terms." ' (*Mastrobuono v. Shearson Lehman Hutton, Inc.* (1995) 514 U.S. 52, 57.)

C. The Act's Preemption of State Law

The act is predicated on Congress's authority to enact substantive rules under the Commerce laws. (*Allied-Bruce Terminix Cos. v. Dobson, supra,* 513 U.S. at p. 271; *Perry v. Thomas, supra,* 482 U.S. at p. 489; *Southland Corp. v. Keating* (1984) 465 U.S. 1, 11.) The act " 'creates a body of federal substantive law' " requiring that arbitration agreements be honored. (*Southland Corp. v. Keating, supra,* 465 U.S. at pp. 12 & 15, fn. 9; accord, *Mitsubishi Motors v. Soler Chrysler-Plymouth* (1985) 473 U.S. 614, 626.) That federal substantive law is applicable in both state and federal courts. (*Allied-Bruce Terminix Cos. v. Dobson, supra,* 513 U.S. at pp. 271-272; *Perry v. Thomas, supra,* 482 U.S. at p. 489; *Southland Corp. v. Keating, supra,* 465 U.S. at p. 12.)

However, the scope of federal preemption under the act is not complete. The United States Supreme Court has

held: "The [act] contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration. [Citation.]" (*Volt Info. Sciences v. Leland Stanford Jr. U.* (1989) 489 U.S. 468, 477.) Rather, state law is preempted to the extent it stands as an obstacle to contractual arbitration. As the United States Supreme Court explained in *Volt*: "[E]ven when Congress has not completely displaced state regulation in an area, state law may nonetheless be pre-empted to the extent that it actually conflicts with federal law – that is, to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' [Citation.]" (*Volt Info. Sciences v. Leland Stanford Jr. U., supra,* 489 U.S. at p. 477.) With respect to section 2 of the act, the court has explained: "In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and *withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.*" (*Southland Corp. v. Keating, supra,* 465 U.S. at p. 10, italics added; accord, *Doctor's Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, 684-685.) As stated in *Perry v. Thomas, supra,* 482 U.S. at page 489: "Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."

The United States Supreme Court has further delineated the preemptive scope of the act in a series of decisions. As noted above, section 2 of the act places arbitration agreements on an equal footing with contracts generally. (*Allied-Bruce Terminix Cos. v. Dobson, supra,* 513 U.S. at pp. 270-271; *Doctor's Associates, Inc. v. Casarotto,*

supra, 517 U.S. at pp. 684-685.) In view of that purpose, the Supreme Court has held: "Thus, generally applicable contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2. [Citations.]" (*Doctor's Associates, Inc. v. Casarotto, supra*, 517 U.S. at p. 687.) However, a state law that invalidates the express terms of an arbitration agreement is preempted by the act. For example, the Supreme Court has held, "[I]f contracting parties agree to *include* claims for punitive damages within the issues to be arbitrated, the [act] ensures that their agreement will be enforced according to its terms even if a rule of state law would otherwise exclude such claims from arbitration." (*Mastrobuono v. Shearson Lehman Hutton, Inc., supra*, 514 U.S. at p. 58, orig. italics.) Further, a court may not invalidate an arbitration agreement under a state law that conditions enforceability of the agreement on compliance with special rules not applicable to contracts generally. (*Doctor's Associates, Inc. v. Casarotto, supra*, 517 U.S. at p. 687.) Any such rule is preempted by the act. (*Ibid.*) Also, a state law requiring judicial consideration of a claim contrary to the parties' agreement to arbitrate that claim directly conflicts with the act and violates the Supremacy Clause. (*Perry v. Thomas, supra*, 482 U.S. at p. 491 [the act preempted California statute providing that court actions for collection of wages may be maintained without regard to the existence of any private agreement to arbitrate]; *Southland Corp. v. Keating, supra*, 465 U.S. at p. 16 [the act preempted California statute requiring judicial consideration of franchise investment law claims even though the parties had agreed to arbitrate the claim].) In short, the act preempts

state anitarbitration law so as to prevent state and federal courts from reaching different results about the validity and enforceability of arbitration agreements in similar cases. (*Allied-Bruce Terminix Cos. v. Dobson, supra,* 513 U.S. at pp. 271-272.)

D. California Decisional Authority Authorizes Classwide Arbitration

Under California decisional authority, classwide arbitration is permissible. (*Keating v. Superior Court* (1982) 31 Cal.3d 584, 608-614, revd. other grounds in *Southland Corp. v. Keating, supra,* 465 U.S. at p. 16; *Izzi v. Mesquite Country Club* (1986) 186 Cal.App.3d 1309, 1318-1322.)[2] In *Keating v. Superior Court, supra,* 31 Cal.3d at pages 608-614, the California Supreme Court considered whether a trial court could order classwide arbitration under the adhesive but enforceable franchise contracts. The court first noted the "importance of the class action device for vindicating rights asserted by large groups of persons." (*Id.* at p. 609.) The court then reasoned: "If the right to classwide proceedings could be automatically eliminated in relationships governed by adhesion contracts through the inclusion of a provision for arbitration, the potential for undercutting these class action principles, and for chilling the effective protection of interests common to a group, would be substantial." (*Ibid.*) The

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[2] We adopt the term "classwide" arbitration as used by the California Supreme Court in *Keating,* rather than the equally descriptive phrases "Class arbitration" or "Class action arbitration."

Supreme Court rejected the option of requiring each individual franchisee to arbitrate its claims as "resulting in needless duplication and the potential for inconsistent awards." (*Ibid.*) The Supreme Court identified a different problem which justified the use of classwide arbitration as follows: "It is common knowledge that arbitration clauses frequently appear in standardized contracts of adhesion. A primary consideration which has led courts to uphold such clauses, despite the adhesive nature of the contract, is the belief that arbitration is not oppressive and does not defeat the reasonable expectations of the parties. (*Madden v. Kaiser Foundation Hospitals* [(1976)] 17 Cal.3d 699, 710, 712.) If, however, an arbitration clause may be used to insulate the drafter of an adhesive contract from any form of class proceeding, effectively foreclosing many individual claims, it may well be oppressive and may defeat the expectations of the nondrafting party. [¶] One possible solution to this dilemma would be to hold that arbitration agreements contained in contracts of adhesion may not operate to stay properly maintainable class actions. [Citations.]" (*Id.* at p. 610.)

The California Supreme Court then turned to the question whether consolidation of the arbitration proceedings should be allowed. The court cited federal authority for consolidation of arbitration proceedings by reliance on rule 42(a) of the Federal Rules of Civil Procedure (FRCP). It concluded that by analogy, FRCP rule (28 U.S.C.), the class action provision, would provide a basis for ordering classwide arbitrations in federal court.[3]

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[3] Notably, the cases cited in *Keating* that relied on the FRCP in ordering consolidated arbitration were later disapproved or

The California Supreme Court further noted that other state courts had allowed consolidation of arbitration proceedings even in the absence of statutory authority. Further, in California, consolidated arbitration was authorized by section 1281.3 of the Code of Civil Procedure. The court observed that Code of Civil Procedure section 1281.3 authorized consolidated arbitration even when the arbitration agreements involved provide for different procedures or methods of selecting arbitrators; the statute provides for court resolution of any such conflicts. (*Id.* at p. 612; see Code Civ. Proc., § 1281.3, subd. (3).) In *Keating*, the Supreme Court described the potential situation confronting parties in consolidated arbitrations as follows: "Each contract may provide a different procedure for arbitration, or a different method of selecting the arbitrator. Federal courts have held that a court 'can mold the method of selection and the number of arbitrators to implement the consolidated proceedings.' (*Matter of Czarnikow-Rionda Co. Inc.* [(S.D.N.Y. 1981). 512 F.Supp. 1308], 1309.) Similarly, Code of Civil Procedure section 1281.3 provides that consolidated arbitration proceedings may be ordered inter alia, where 'one party is a party to a separate arbitration agreement or proceeding with a third party,' and that if the agreements do not mesh in their description of procedure, a court has authority to appoint an arbitrator, and to 'resolve [conflicts among the agreements' and determine the rights and duties of the various parties to achieve substantial justice under all the circumstances.' Thus, a party may be

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called into doubt in *Government of United Kingdom v. Boeing Co.* (2d Cir. 1993) 998 F.2d 68, 71, 74.)

forced into a coordinated arbitration proceeding in a dispute with a party with whom he has no agreement, before an arbitrator he had no voice in selecting and by a procedure he did not agree to." (*Id.* at p. 612.) The *Keating* court then contrasted the situation in a classwide arbitration as follows: "In these respects, an order for classwide arbitration in an adhesion context would call for considerably less intrusion upon the contractual aspects of the relationship. The members of a class subject to classwide arbitration would all be parties to an agreement with the party against whom their claims is asserted; each of those agreements would contain substantially the same arbitration provision; and if any of the members of the class were dissatisfied with the class representative, or with the choice of arbitrator, or for any other reason would prefer to arbitrate on their own, they would be free to opt out and do so. Moreover, the interests of justice that would be served by ordering classwide arbitration are likely to be even more substantial in some cases than the interests that are thought to justify consolidation." (*Ibid.*)

The California Supreme Court concluded that "a court is not without authority" to order classwide arbitration. (*Keating v. Superior Court, supra,* 31 Cal.3d at p. 613.) It held that a trial court may, in its discretion, and upon consideration of specified factors, order arbitration on a classwide basis. (*Keating v. Superior Court, supra,* 31 Cal.3d at p. 613.) The California Supreme Court explained the factors to be considered as follows: "Classwide arbitration . . . must be evaluated, not in relation to some ideal but in relation to its alternatives. If the alternative in a case of this sort is to force hundreds of individual franchisees each to litigate its cause with Southland in a

separate arbitral forum, then the prospect of classwide arbitration, for all its difficulties, may offer a better, more efficient, and fairer solution. Where that is so, and gross unfairness would result from the denial of opportunity to proceed on a classwide basis, then an order structuring arbitration on that basis would be justified. [¶] Whether such an order would be justified in a case of this sort is a question appropriately left to the discretion of the trial court. In making that determination, the trial court would be called upon to consider, not only the factors normally relevant to class certification, but the special characteristics of arbitration as well, including the impact upon an arbitration proceeding of whatever court supervision might be required, and the availability of consolidation as an alternative means of assuring fairness." (*Keating v. Superior Court, supra,* 31 Cal.3d at p. 613.) The court recognized that classwide arbitration would require a greater degree of judicial involvement than is normally associated with arbitration. Evaluated in relation to the alternatives, however, the Supreme Court concluded that "classwide arbitration, for all its difficulties, may offer a better, more efficient, and fairer solution." (*Ibid.*)

The California Supreme Court remanded *Keating* to the trial court for a determination "as to whether the interests of justice require that the order to arbitrate be conditioned upon Southland's acceptance of classwide arbitration." (*Id.* at p. 591.) The California Supreme Court held: "Whether classwide proceedings would prejudice the legitimate interests of the party which drafted the adhesion agreement must also be considered, and that party should be given the option of remaining in court rather than submitting to classwide arbitration." (*Id.* at

pp. 613-614.) No issue has been raised in this extraordinary writ proceeding with respect to that aspect of the *Keating* decision.[4]

Although *Keating* involved arbitration agreements within the purview of the act, the defendant did not contend, nor did the California Supreme Court decide, whether classwide arbitration was preempted by federal law. (*See Southland Corp. v. Keating, supra,* 465 U.S. at pp. 8-9.) Upon review of *Keating,* the United States Supreme Court noted that the question whether classwide arbitration was contrary to the act was neither raised nor decided in the California Supreme Court. Hence, the United States Supreme Court held, it was without jurisdiction to resolve the question as a matter of federal law. (*Id.* at p. 9.)

Following the United States Supreme Court's decision in *Keating,* the California Court of Appeals applied this state's Supreme Court's decision in *Keating* in a case within the ambit of the act. In *Lewis v. Prudential-Bache Securities, Inc.* (1986) 179 Cal.App.3d 935, 938, 945-946, relying on *Keating v. Superior Court, supra,* 31 Cal.3d at page 613, the Court of Appeal reversed an order denying

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[4] The respondent court has not yet certified the class or even finally determined plaintiff's claims may proceed on a classwide basis. Any discussion on our part as to whether plaintiffs' claims should actually proceed on a classwide basis would be premature. The only issue before us is whether the respondent court could order discovery on the class certification issue. Blue Cross contends the act preempts any possibility of classwide certification and possible arbitration of plaintiffs' claims in such a forum.

a petition to compel arbitration of a class action complaint where the arbitration agreements fell under the act. The court noted that the United States Supreme Court had remanded *Keating* without deciding whether the act precluded classwide arbitration. It did not otherwise discuss the federal preemption question.[5]

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[5] The Pennsylvania Superior Court agreed with *Keating* in *Dickler v. Shearson Lehman Hutton* (1991) 596 A.2d 860, 861-863 (appeal den. (1992) 616 A.2d 984). The arbitration provisions at issue in *Dickler* were contained in securities industry client agreements and therefore fell under the act. They contained no express provision whether class arbitration was intended or considered. The Pennsylvania court noted the United States Supreme Court had not ruled on the propriety of classwide arbitration in *Southland Corp. v. Keating, supra,* 465 U.S. at pages 8-9. (*Dickler v. Shearson Lehman v. Hutton, supra,* 596 A.2d at pp. 862-863.) The Pennsylvania court held: "Given the three paths down which this litigation can be directed – compelled individual arbitration, class action in a court of law, or compelled classwide arbitration – the last choice best serves the dual interest of respecting and advancing contractually agreed upon arbitration agreements while allowing individuals who believe they have been wronged to have an economically feasible route to get injunctive relief from large institutions employing adhesion contracts. [¶] The availability of class suits in arbitration proceedings precludes either party from forcing the other to litigate in a position less advantageous than that for which they contracted. Allowing the suit to proceed through the court would defeat the purpose of the arbitration agreement, allowing plaintiffs to escape obligated arbitration in order to be heard in the sympathetic province of a jury trial. Future litigants might feel encouraged to join classes together for this single purpose when they otherwise would have been satisfied with individually litigating their claim. [¶] Compelling individual arbitration would force individuals already straitjacket[ed] by an industry-wide practice of arbitration agreements to fight alleged improprieties at an exorbitant economic cost. Individual

Also subsequent to our Supreme Court's decision in *Keating*, the Court of Appeal in *Garden Grove Community Church v. Pittsburgh-Des Moines Steel Co.* (1983) (140 Cal.App.3d 251, 262, considered whether Code of Civil Procedure section 1281.3, authorizing consolidated arbitration, was preempted by the act. The court held it was not. (*Ibid.*) it stated simply: "We see no conflict between the means the Legislature has chosen to effect this policy [favoring consolidating arbitrations] – giving the trial court discretion to order consolidated arbitration – and the federal scheme of regulation embodied in the [act]." (*Ibid.*)

E. Lower Federal Court Decisions

In construing and applying the act, we are bound to follow opinions of the United States Supreme Court. (U.S. Const., art. VI, cl. 2; *Rohr Aircraft Corp. v. County of San Diego* (1959) 51 Cal.2d 759, 764-785, revd. on other grds. (1960) 362 U.S. 628, 636 [federal Reconstruction Finance Corporation Act]; *Stock v. Plunkett* (1919) 181 Cal. 193,

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arbitration would be small deterrent to companies certain that few proceedings will be instituted against them. Because the principles of *res judicata* and collateral estoppel are not applicable to arbitration proceedings, each plaintiff would be forced to fully litigate his complaint. [¶] . . . Fairness mandates . . . that the Dickler Group, bound by adhesion form contracts to arbitration agreements, be able to protect their interests by proceeding as a class through arbitration." (*Id.* at p. 867, orig. italics.)

194-195 [federal statute with reference to location of mining claims]; *Garcia v. Superior Court* (1996) 42 Cal.App.4th 177, 180 [federal Civil Rights Act]; *Gervase v. Superior Court* (1995) 31 Cal.App.4th 1218, 1228-1229 [federal Racketeer Influenced and Corrupt Organizations Act (RICO)]; *Elliott v. Albright* (1989) 209 Cal.App.3d 1028, 1034 [the act].) As noted above, however, the United States Supreme Court has never reached the question whether the act precludes classwide arbitration under state law. Further, we are not bound by lower federal court decisions construing the act. (*Ibid.*)

Blue Cross argues we should adopt a United States Court of Appeals decision which barred class-wide arbitration in the federal district courts absent an express agreement to arbitrate class claims. The United States Court of Appeals for the Seventh Circuit has held "that absent a provision in the parties' arbitration agreement providing for class treatment of disputes, a *[United States] district court* has no authority *[under federal law]* to certify classwide arbitration." (*Champ v. Siegel Trading Co., Inc.* (7th Cir. 1995) 55 F.3d 269, 271; accord, *Randolph v. Green Tree Financial Corp.* (M.D. Ala. 1997) 991 F.Supp. 1410, 1423-1424; *Howard v. Klynveld Peat Marwick Goerdeler* (S.D.N.Y. 1997) 977 F.Supp. 654, 665, fn. 7; *Gammaro v. Thorp Consumer Discount Co.* (D.Minn. 1993) 828 F.Supp. 673, 674.) The *Champ* court reasoned as follows: under section 4 of the act, a federal district court is required to enforce arbitration agreements " 'in accordance with the terms of the agreement.' 8 U.S.C. § 4"; there was nothing in the written arbitration agreements expressly providing for classwide arbitration, the act is silent on the issue of classwide arbitration; several other circuit courts had

held that absent an express provision in the parties arbitration agreement, section 4 of the act barred a district court judge or magistrate from applying the FRCP to *consolidate* abitrations; and "[f]or a federal court to read [a classwide arbitration] term into the parties' agreement would 'disrupt[ ] the negotiated risk/benefit allocation and direct[ ] [the parties] to proceed with a different sort of arbitration.' " (*Champ v. Siegel Trading Co., Inc., supra,* 55 F.3d at pp. 274-277.) The *Champ* decision adopted the reasoning of other circuit Courts of Appeal with respect to consolidation of arbitrations – that absent an agreement to the contrary, section 4 of the act precludes a federal district judge or magistrate from ordering consolidation in the arbitration setting. (*Government of United Kingdom v. Boeing Co.* (2d Cir. 1993) 998 F.2d 68, 74; *Del E. Webb Const. v. Richardson Hosp. Authority* (5th Cir. 1987) 823 F.2d 145, 150; *American Centennial Ins. v. National Cas. Co.* (6th Cir. 1991) 951 F.2d 107, 108; *Baesler v. Continental Grain Co.* (8th Cir. 1990) 900 F.2d 1193, 1195; *Weyerhaeuser Co. v. Western Seas Shipping Co.* (9th Cir. 1984) 743 F.2d 635, 637; *Protective Life Ins. Corp. v. Lincoln Nat. Life Ins.* (11th Cir. 1989) 873 F.2d 281, 282; see Consolidation by Federal Court of Arbitration Proceedings Brought Under Federal Arbitration Act (9 U.S.C.S. § 4) (1991) 104 A.L.R.Fed. 251.)

In *Champ* it was argued that federal class action rules applied to an arbitration subject to the act. FRCP rule 23 authorized class actions. FRCP rule 81(a)(3) provided that the civil rules applied to proceeding under the act "only to the extent that matters of procedure are not provided for in those statutes." Hence, it was contended that

classwide arbitration could be ordered. The Seventh Circuit panel rejected that argument as follows: "First of all, Rule 81(a)(3) says that the Federal Rules fill in only those procedural gaps left open by the [act.] But as explained above, section 4 of [the act] requires that we enforce an arbitration agreement according to its terms. Such terms conceivably could consist of consolidated or even class arbitration. The parties here did not include in their agreement an express term providing for class arbitration. Thus, one could say that through the proper application of 9 U.S.C. § 4 the [act] has already provided the type of procedure to be followed in this case, namely, non-class-action arbitration. [Citations.] [¶] But more to the point, we still could not accept the intervenors' assertions because by its language Rule 81(a)(3) only applies to *Judicial* proceedings under the [act.] [Citations.] . . . [N]othing in the language of Rule 81(a)(3) purports to apply the Federal Rules of Procedure to the actual proceedings on the merits before the arbitrators, which are normally regulated by the American Arbitration Association's Commercial Arbitration Rules. [Citation.] As the Fourth Circuit has explained it: '[a]n arbitration hearing is not a court of law. When contracting parties stipulate that disputes will be submitted to arbitration, they relinquish the right to certain procedural niceties which are normally associated with a formal trial.' *Burton v. Bush*, 614 F.2d 389, 390 (4th Cir. 1980) (citations omitted); . . .). One of those 'procedural niceties' is the possibility of pursuing a class action under Rule 23. Therefore, absent an express provision in the parties' arbitration agreement providing for class arbitration, Rule 81(a)(2) does not provide a district court with the authority to reform the

parties' agreement and order the arbitration panel to hear these claims on a class basis pursuant to Rule 23." (*Champ v. Siegel Trading Co. Inc., supra,* 55 F.3d at pp. 276-277, fn. omitted, orig. emphasis.)

In contrast to *Champ,* the Court of Appeals for the First Circuit has held a district court *does* have the power to order *consolidated* arbitration where the agreement is silent as to consolidation, but *state law* specifically provides for such procedure. In *New England Energy Inc. v. Keystone Shipping Co.* (1st Cir. 1988) 855 F.2d 1, 3, the Court of Appeals for the First Circuit held there was "no compulsion of law or policy barring a district court from issuing [an order consolidating two arbitrations], at least when the agreement between the parties is silent and the pertinent state law specifically provides for such." That court reasoned: the act does not preempt all state law on arbitration, "only laws the would override the parties' choice to arbitrate rather than litigate in court, in direct conflict with the Act's primary purpose of ensuring the enforcement of privately negotiated arbitration agreements" (*id.* at p. 4); the particular state statute at issue, the Massachusetts arbitration consolidation provision, did not directly conflict with the act which says nothing about consolidation; and ordering consolidation, where the parties' contracts were silent on the subject, would not conflict with section four of the act, requiring that courts enforce arbitration agreements according to their terms; and this was because such an order would be in accordance with, rather than contradicting, the contractual terms. (*Id.* at p. 5). On the last point, the court stated as follows: "Appellee's argument . . . is not that the Act directly contradicts the Massachusetts statute, but that

the state law is superseded in this case because the parties' contracts do not provide for consolidation, and an order to consolidate would therefore conflict with the requirement in section four of the federal Act that courts enforce arbitration agreements according to their terms. [¶] We disagree that ordering consolidation pursuant to a state statute when the contract is silent on the subject improperly modifies the agreement struck by the parties in violation of section four. We believe, as appellants argue, that an order not contradicting the contractual terms regarding arbitration is 'in accordance with [those] terms.' . . . Simply put, arbitration is still arbitration even if it is consolidated arbitration." (*Ibid.*)

The *New England Energy* case further reasoned that the relevant United States Supreme Court decisions directed the preemptive effect of the act at preventing the diversion of cases from arbitration. The court stated; "More particularly, nothing in the recent series of Supreme Court decisions indicates that a state law whose purpose is to promote the expedition resolution of cases *by means of the arbitral process* is at odds with the policy behind the Federal Arbitration Act. In each of the cases emphasized by the appellee, the justices were faced with competing laws that would have placed claims in the courts instead of an arbitration. Two of those cases involved state law. In *Southland,* the California Supreme Court held that a state franchise investment statute invalidated the parties' agreement to arbitrate certain claims. Similarly, in *Perry,* the California Supreme Court had upheld a state labor law requirement that litigants be provided a judicial forum for resolving wage disputes, despite the existence of a private agreement to arbitrate

such disputes. In holding the state laws to be preempted in *Southland* and *Perry*, the Supreme Court observed that '[w]e see nothing in the Act indicating that the broad principle of enforceability is subject to any additional limitations under state law.' [Citations.] [¶] The Massachusetts arbitration consolidation provision, as appellants seek to enforce it, does not in any way limit 'the broad principle of private agreements to arbitrate. There is no attempt here to divert a case from arbitration to court. Massachusetts seeks only to make more efficient the process of arbitrating. Although the Supreme Court has held that agreements to arbitrate must be enforced 'even if the result is "piecemeal" litigation,' [citation], the Court also has recognized the Act's endorsement of 'speedy and efficient decisionmaking,' [citation]. We fail to see why a state should be prevented from enhancing the efficiency of the arbitral process, so long as the state procedure does not directly conflict with a contractual provision." (*New England Energy Inc. v. Keystone Shipping Co., supra,* 855 F.2d at pp. 6-7, orig. emphasis.)[6]

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[6] Notably, Blue Cross conceded at oral argument that consolidated arbitration as authorized by Code of Civil Procedure section 1281.3 would be allowed in a case within the purview of the act. (See *Garden Grove Community Church v. Pittsburgh-Des Moines Steel Co., supra,* 140 Cal.App.3d at p. 262 [Code of Civil Procedure section 1281.3 not preempted by the act].) It attempted to distinguish consolidated and classwide arbitration on the grounds the *Keating* rule was nonstatutory, while consolidation is authorized by statute in this state. We conclude the purported distinction is one without a difference. The federal preemption analysis is the same whether the state rule is statutory regulatory, or judicially declared. (*Securities Industry Ass'n. v. Connolly* (1st Cir. 1989) 883 F.2d 1114, 1120, fn. 4; *Chase v. Blue Cross of California* (1996) 42 Cal.App.4th 1142, 1161, fn. 16.)

We decline to apply the Seventh Circuit decision in *Champs* to this case. As discussed below, we conclude section 4 of the act does not preclude application of the California classwide arbitration rule. Further, we believe the First Circuit *New England Energy* decision is both analogous to our facts and better reasoned. We conclude that when the arbitration agreement between the parties is silent as to classwide arbitration and state law specifically authorizes it in appropriate cases, an order compelling classwide arbitration neither contradicts the contractual terms nor contravenes the policy behind the act.

F. Section 4 of the Act Does Not Preclude Application of the California Classwide arbitration Rule

As discussed above, the reasoning of the federal circuit court decisions on classwide and consolidated arbitrations turns on section 4 of the act. Significantly, the United States Supreme Court has repeatedly indicated that sections 3 and 4 of the act *do not apply in state courts.* In *Southland Corp. v. Keating, supra,* 465 U.S. at page 16, footnote 10, the court stated: "In holding that the Arbitration Act preempts a state law that withdraws the power to enforce arbitration agreements, we do not hold that §§ 3 and 4 of the Arbitration Act apply to proceedings in state courts. Section 4, for example, provides that the Federal Rules of Civil Procedure apply in proceedings to compel arbitration. The Federal Rules do not apply in such state court proceedings." In *Volt Info. Sciences v. Leland Stanford Jr. U., supra,* 489 U.S. at pages 476-477, the United States Supreme Court described an argument that

sections 3 and 4 of the act were not applicable in state courts as "not without some merit," but unnecessary to reach in that case. Significantly, however, the opinion contains the following discussion: "While we have held that the [act's] 'substantive' provisions – §§ 1 and 2 – are applicable in state as well as federal court, [citation], we have never held that §§ 3 and 4, which by their terms appear to apply only to proceedings in federal court, see 9 U.S.C. § 3 (referring to proceedings 'brought in any of the courts of the United States'); § 4 (referring to 'any United States district court'), are nonetheless applicable in state court. See *Southland Corp. v. Keating, supra,* at 16, n. 10 (expressly reserving the question whether '§§ 3 and 4 of the Arbitration Act apply to proceedings in state courts'); see also *id.*, at 29 [ ] (O'CONNOR, J., dissenting) (§§ 3 and 4 of the [act] apply only in federal court)." (*Volt Info. Sciences v. Leland Stanford Jr. U., supra,* 489 U.S. at p. 477, fn. 6.) Further, we have reviewed the legislative history of the act and have not found anything therein that would support a conclusion Congress intended section 4 of the act to apply to the states.

Moreover, in *Rosenthal v. Great Western Financial Securities Corp.* (1996) 14 Cal.4th 394, 405-410, the California Supreme Court held the federal provision for a jury trial as to the existence of an arbitration agreement contained in section 4 of the act did not operate in California courts.[7] Our Supreme Court examined the language of

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[7] Section 4 of the act provides in part: "If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. . . . Where such issue is raised, the party

section 4 of the act. It held section 4 of the act "does not explicitly govern the procedures to be used in state courts." (*Id.* at p. 407.) Section 4 of the act "contemplates a petition in 'United States district court,' and provides that certain steps are to be taken 'in the manner provided by the Federal Rules of Civil Procedure.' " (*Ibid.*) The *Rosenthal* court further considered principles of federal preemption. It concluded that "a state procedural statute or rule that frustrated the effectuation of section 2's central policy would, where the federal law applied, be preempted by the [act,]" (*id.* at p. 408); however, a state procedure that serves to further, rather than defeat, "full and uniform effectuation of the federal law's objectives" – to ensure that arbitration agreements are enforced according to their terms – is to be followed in California, rather than section 4 of the act. (*Id.* at p. 410.) The *Rosenthal* court noted: "It is a 'general and unassailable proposition . . . that States may establish the rules of procedure governing litigation in their own courts,' even when the controversy is governed[, as here,] by substantive federal law. (*Felder v. Casey* (1988) 487 U.S. 131, 138[ ].) 'By the same token, however, where state courts entertain a federally created cause of action, the "federal right cannot be defeated by the forms of local practice." ' " (*Id.* at p. 409.) More specifically the court stated: "Uniform national application of a federal substantive law requires,

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alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose."

in particular, that state courts not apply procedural rules that would 'frequently and predictably produce different outcomes . . . based solely on whether the [federal] claim is asserted in state or federal court.' ([*Felder v. Casey, supra,* 487 U.S. at p. 138].) (*Id.* at p. 409.) The California Supreme Court concluded: "Like other federal procedural rules, therefore, 'the procedural provisions of and [act] are not binding on state courts . . . *provided applicable state procedures do not defeat the rights granted by Congress.*' [Citation.]"; and "[b]ecause the California procedure for deciding motions to compel [arbitration] serves to further, rather than defeat, full and uniform effectuation of the federal law's objectives, the California law, rather than section 4 of the [act], is to be followed in California courts." (*Id.* at p. 410, orig. italics.)

The United States Supreme Court's decision in *Volt Info. Sciences v. Leland Stanford Jr. U., supra,* 489 U.S. at pages 470 and 476, indirectly supports our resolution of the present case. At issue in *Volt* was California Code of Civil Procedure section 1281.2, subdivision (c), which allows a court to stay arbitration pending resolution of related litigation. The contract at issue in *Volt* contained a choice-of-law provision which stated, " '[T]he Contract shall be governed by the law of the place where the Project is located.' " (*Id.* at p. 470.) This state's Court of Appeal had interpreted the choice-of-law provision as an agreement to apply the state rules governing the conduct of arbitration. The United States Supreme Court found no basis for interfering with the state court's interpretation. The court held "that application of the California statute is not pre-empted by the [act] in a case where the parties

have agreed that their arbitration agreement will be governed by the law of California." (*Volt Info. Sciences v. Leland Stanford Jr. U., supra,* 489 U.S. at p. 470.) Of particular relevance to the present case, the court stated: "There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate" (*Id.* at p. 476.) Further, the United States Supreme Court held: "[The act] itself contains no provision designed to deal with the special practical problems that arise in multiparty contractual disputes when some or all of the contracts at issue include agreements to arbitrate. California has taken the lead in fashioning a legislative response to this problem, by giving courts authority to consolidate or stay arbitration proceedings in these situations in order to minimize the potential for contradictory judgments. [Citation.]" (*Id.* at p. 476, fn. 5.) We find persuasive the United States Supreme Court's discussion in *Volt* of the preemptive effect of the act as to state procedural rules.[8]

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[8] Plaintiffs have belatedly asserted, at oral argument and in a letter brief, that a choice of law provision in the underlying health insuring contracts constituted an express agreement to apply California's arbitration rules, therefore, under *Volt*, the act has no preemptive effect. Blue Cross's "Prudent Buyer Plan Service Agreement and Combined Evidence of Coverage and Disclosure Form" contained the following choice of law provision: "PART V GENERAL PROVISIONS [¶] . . . F. Governing Law: . . . This Agreement shall be construed and enforced in accordance with the laws of the State of California." The choice-of-law provision and its purported effect was not raised in the trial court. (Nor was it raised in the return to the present writ petition.) This court will not consider arguments raised for the first time in a writ petition. (Cf., e.g., *People v.*

We conclude that section 4 does not bar state courts from ordering classwide arbitration. Therefore, it does not operate to preclude classwide arbitration under California decisional authority. Further, the California rule allowing classwide arbitration, like the statute at issue in *Rosenthal*, can further rather than defeat the act's goal of enforcing agreement to arbitrate. Therefore, California's rule permitting classwide arbitration is not preempted by section 4.

Rodrigues (1994) 8 Cal.4th 1060, 1119; *People v. Garceau* (1993) 6 Cal.4th 140, 173; *People v. McPeters* (1992) 2 Cal.4th 1148, 1174; *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1138; *Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1065-1066; *Estate of Leslie* (1984) 37 Cal.3d 186, 202.) Even if the issue were properly before us, we would not find it persuasive. *Volt* does not stand for the proposition a general choice-of-law provision evidences in all cases an express intent to incorporate a state's arbitration rules into an arbitration agreement. (*Mastrobuono v. Shearson Lehman Hutton, Inc., supra*, 514 U.S. at pp. 58-64, & fn.4.) In *Volt*, the United States Supreme Court accepted this state court's interpretation of the choice-of-law provision as meaning that the parties had incorporated California arbitration rules into their arbitration agreement. (*Volt Info. Sciences, Inc. v. Leland Stanford Jr. U., supra*, 489 U.S. at pp. 474-476.) The high court's decision in *Volt* therefore rested on the assumption the parties had incorporated California rules of arbitration into their arbitration agreement. (*Id.* at p. 476.) *Volt* held only that the act does not prevent the enforcement of agreements to arbitrate under state rules. (*Id.* at pp. 478-479.) There has been no finding in the present case that the parties expressly agreed to incorporate California's arbitration rules into their agreements. Contrary to plaintiffs' assertion, *Volt* does not compel this court to conclude that by virtue of the choice-of-law provision in the underlying health insuring agreements the parties agreed California's classwide arbitration rule would govern in this case.

Blue Cross contends it is federal substantive law, which this court is bound to follow, that no classwide arbitration can be compelled unless the parties have expressly agreed to such procedure. We disagree. First, as discussed above, we conclude section 4 of the act does not apply in state courts to bar in all cases classwide arbitration. Second, even if it did apply, the United States Supreme Court has never held that the language of section 4 of the act providing for the issuance of a district court order "directing the parties to proceed to arbitration *in accordance with the terms of the agreement*" (9 U.S.C. § 4, italics added), means that no classwide arbitration can occur unless the parties have expressly so provided. The legislative history of the act and the decisions of the United States Supreme Court make clear that the act's preemptive scope is limited. Its purpose was to abolish antiarbitration law and to make agreements to arbitrate specifically enforceable. Consistent with that purpose, we believe the language "in accordance with the terms of the agreement" (9 U.S.C. § 4) means in accordance with the agreement to arbitrate. Third, under federal law, as articulated in *Champ* and the cases on which the Seventh Circuit relied, there is no authority for classwide arbitration. Under those circumstances, the *Champ* court refused to read such authority into the parties' arbitration agreement. Here, on the other hand, state law authorizes classwide arbitration. In the absence of an express agreement *not* to proceed to arbitration on a classwide basis, ordering the parties to arbitrate class claims as authorized by state law does not conflict with their contractual arrangement.

Blue Cross also contends that an order compelling classwide arbitration in this case would interfere with the parties' intentions; it asserts it bargained for individual arbitration conducted according to the rules of the American Arbitration Association (AAA), not this "hybrid" classwide arbitration requiring judicial intervention. This argument is premature. The only issue before this court is whether the *Keating* rule is preempted by the act. No order has been entered certifying a class. No order has been entered requiring classwide arbitration. (E.g. *Gainey v. Occidental Land Research* (1986) 186 Cal.App.3d 1051, 1054-1055.) Whether classwide arbitration is appropriate in this matter is a question left to the trial court's discretion upon consideration of a variety of factors. (*Keating v. Superior Court, supra,* 31 Cal.3d at p. 613; *Izzi v. Mesquite Country Club, supra,* 186 Cal.App.3d at pp. 1314, 1322.) Moreover, under *Keating,* an arbitration agreement that is silent as to classwide arbitration is amenable to such procedure. Further, there has been no showing that an order compelling classwide arbitration would conflict with the agreement to proceed under AAA rules. Classwide arbitration has been held allowable in cases involving contracts to arbitrate under AAA rules, although no issue was raised as to any conflict. (See *Izzi v. Mesquite Country Club, supra,* 186 Cal.App.3d at pp. 1314, 1322; *Lewis v. Prudential-Bache Securities, Inc., supra,* 179 Cal.App.3d at pp. 945-946; cf. Code Civ. Proc., § 1281.3; *Garden Grove Community Church v. Pittsburgh-Des Moines Steel Co., supra,* 140 Cal.App.3d at pp. 257, 266 [consolidating arbitrations where agreements provided for arbitration under AAA rules]; *Conejo Valley Unified School Dist. v. William Blurock & Partners, Inc.* (1980) 111

Cal.App.3d 983, 989-993 [consolidated arbitration pursuant to section 1281.3 allowable despite conflict with arbitrator selection provisions of AAA rules].) And even if a conflict exists between the AAA rules and classwide arbitration, the trial court may resolve the conflict. (Cf. Code Civ. Proc., § 1281.3; *see Keating v. Superior Court, supra,* 31 Cal.3d at pp. 612-613.) It is unlikely the AAA would refuse to abide by a court order for classwide arbitration. (See *Bock v. Drexel Burnham Lambert Inc.* (NYSup. Ct. 1989) 541 N.Y.S.2d 172, 174 ["Apparently, the AAA recognizes that consolidation may be the subject of a court order. . . . "]; *Robinson v. Warner* (1974) 370 F.Supp. 828, 829 ["[T]he AAA has indicated that it will abide by the Court's order in the event a consolidated arbitration is deemed appropriate"]; *Symphony Fab. Corp. v. Bernson Silk Mills* (NY 1963) 240 N.Y.S.2d 23, 27 ["The rules of the American Arbitration Association do not forbid a consolidation or joint trial before the same arbitrator of independent proceedings"].) As discussed above, we conclude the trial court is not barred from issuing an order directing classwide arbitration when the agreement between the parties is silent and state decisional authority specifically provides for such arbitration. That the parties agreed to arbitration under AAA rules does not prevent a court from ordering arbitration on a classwide basis.

G. Conclusion

Congress's purpose in enacting the act was simple – to abolish archaic law under which courts refused to enforce arbitration agreements, and to make voluntary

agreements to arbitrate disputes specifically enforceable. To that end, the act created federal substantive law requiring that arbitration agreements be enforced. That federal substantive law applies in both state and federal courts. However, Congress did not intend to occupy the entire field of arbitration. Rather, the act preempts state law only to the extent it stands as an obstacle to the enforcement of contractual agreements to arbitrate. As explained in *Southland Corp. v. Keating, supra,* 465 U.S. at page 10, "Congress . . . withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." California decisional authority authorizing classwide arbitration *in appropriate cases:* is not preempted by the act; does not directly conflict with the act, which is silent as to classwide arbitration; does not stand as an obstacle to contractual arbitration; does not conflict with the act's purpose; does not require a judicial forum for resolving claims that the parties have agreed to arbitrate; and does not otherwise divert a case from arbitration. (*Perry v. Thomas, supra,* 482 U.S. at p. 491.) It does not invalidate the arbitration agreement or condition its enforceability on compliance with special rules not applicable to contracts generally. (*Doctor's Associates, Inc. v. Casarotto, supra,* 517 U.S. at p. 687.) It will not produce different outcomes on the merits based solely on whether the claim is asserted in state or federal court. (*Felder v. Casey* (1988) 487 U.S. 131, 138; *Rosenthal v. Great Western Financial Securities Corp., supra,* 14 Cal.4th at p. 409.) The *Keating* rule can facilitate the enforcement of arbitration agreements by making classwide arbitration available in

appropriate cases. It can promote the expeditious resolution of cases by arbitration. In short, the federal decisional authority relied on by Blue Cross did not prevent the respondent court from permitting discovery as to whether to allow classwide arbitration and later potentially include plaintiffs to be part of the class.

IV. DISPOSITION

The petition for a writ of mandate, prohibition, or other appropriate relief is denied. Plaintiffs, Elizabeth Farquhar and Laurie Winett, shall recover their costs incurred in connection with these extraordinary writ proceedings from defendants, Blue Cross of California and Wellpoint Health Networks, Inc.

CERTIFIED FOR PUBLICATION

TURNER, P.J.

We concur:

ARMSTRONG, J.

GODOY PEREZ, J.

APPENDIX B

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT DIVISION FIVE

BLUE CROSS OF CALIFORNIA, et al., Petitioners, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent. ELIZABETH FARQUHAR, et al., Real Parties in Interest.	B122446 (Super. Ct. No. BC179834) (Bruce E. Mitchell, Temporary Judge) ORDER TO SHOW CAUSE (Filed Jun. 11, 1998)

TO THE SUPERIOR COURT OF LOS ANGELES COUNTY:

The petition for writ of mandate, filed June 1, 1998, having been read and considered, and good cause appearing therefore, you are hereby ordered to show cause before this court in its courtroom at 300 South Spring Street, Los Angeles, California 90013, on July 8, 1998, at 11:00 a.m., why the relief prayed for in the petition should not be granted.

The return to the petition, if any, shall be filed on or before June 22, 1998.

The parties are notified, pursuant to Evidence Code section 459, that in the absence of objection the court will take judicial notice of the file of the respondent court in Farquhar, et al. v. Blue Cross of California, et al., Los Angeles Superior Court No. BC179834.

Pending a determination on the merits of the petition, all proceedings in the underlying action are hereby stayed.

WITNESS THE HONORABLE PAUL TURNER, Presiding Justice of Division Five of the Court of Appeal of the State of California, Second Appellate District.

ATTEST my hand and the seal of this court this ____ day of June, 1998.

JOSEPH A. LANE, Clerk

By _____
Deputy Clerk

APPENDIX C

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

ELIZABETH FARQUHAR, an individual, LAURIE WINETT, an individual, on behalf of themselves, and, all others similarly situated, Plaintiffs, vs. BLUE CROSS OF CALIFORNIA; CALIFORNIACARE HEALTH PLANS; WELLPOINT HEALTH NETWORKS, INC. each a corporation; and DOES 1 through 5000, Defendants.	Case No. BC 179 834 ORDER RE: DEFENDANTS' PETITION TO COMPEL ARBITRATION AND MOTION TO STAY JUDICIAL PROCEEDINGS (Filed Mar. 02, 1998)

ORDER

Defendants' Petition to Compel Arbitration and Motion to Stay Judicial Proceedings having come on regularly for hearing on February 9, 1998, and the Court having considered all of the papers and oral arguments presented by the parties in support of and opposition to the Petition and Motion.

IT IS HEREBY ORDERED as follows:

I. PETITION TO COMPEL ARBITRATION

A. The Petition to Compel Arbitration of the two-named Plaintiffs' individual claims is granted.

1. The arbitration clauses in issue are effective.

2. There has been no waiver by Defendants of the right to arbitrate.

B. To the extent the class claims asserted in the Complaint are certified to proceed to a class adjudication, those claims will also be referred to binding contractual arbitration, pursuant to the arbitration provisions in issue.

II. MOTION TO STAY JUDICIAL PROCEEDINGS

A. The Motion to Stay Judicial Proceedings is granted as to the named Plaintiffs' individual claims.

B. The Motion to Stay Judicial Proceedings is denied as to the class claims alleged in the Complaint. Discovery shall continue as to the class claims for purposes of a possible class certification motion and, as set forth *supra;* if a class is certified, the class claims will be referred to class-wide arbitration for the following reasons:

1. As a preliminary matter, the Court notes that class action treatment is a valuable procedural tool, for both the Court and parties, in appropriate cases. It should not be lightly discarded.

2. Class-wide arbitration is permitted in California. *Keating v. Superior Court,* 31 Cal.3d 584, 613-14, 183 Cal.Rptr. 360 (1982); *Izzy v. Mesquite Country Club,* 186 Cal.App.3d 1309, 1322 (1986).

3. The issue is whether the Federal Arbitration Act ("FAA") bars class arbitration, where the parties' agreement is silent on the subject.

(a) The United States Supreme Court in *Southland Corp. v. Keating*, 465 U.S. 1, 104 S.Ct at 857-58, declined to decide the issue.

(b) Two of the federal decisions cited in support of Defendants' Petition and Motion hold that Section 4 of the FAA precludes class arbitration where the agreement is silent on that issue, on a theory of strict construction of the agreement – what the parties agreed upon, and no more.

(c) The decision of *Coleman v. National Movie-Dine, Inc.*, 449 F.Supp. 945, 947-48 (E.D. Penn. 1978), cited in support of Defendants' Petition, is unclear, but may have ordered the class claims to arbitration.

4. A plaintiff in a civil action has an inherent and pre-existing right to sue as a class representative, and to bring a class action, unless that right is bargained away.

5. The arbitration provision in question is silent on the issue of whether class arbitration is permitted. It states merely that "any" dispute will be resolved in arbitration. This does not clearly and expressly bargain away the right to sue as a class action, or to be a class representative. It would have been easy enough to specify that arbitration was to be individual, only.

6. The arbitration provision in issue is one of adhesion, drafted by the Defendants. Any ambiguities or uncertainties as to its scope should be construed against the drafter.

7. The federal authorities cited hold that the FAA was designed to counter judicial reluctance against enforcing arbitration clauses, and to place arbitration agreements "on the same footing" as other contracts. Assuming strict construction is the appropriate approach, it appears to this Court that strict construction requires that it enforce the contract as written, but take away no more than was bargained for. That is how the Court would construe any other contract provision and is what California has historically done with arbitration agreements. *See, Izzy, supra.*

IT IS SO ORDERED.

DATED: MAR 02 1998

BRUCE E. MITCHELL
Commissioner of the
Superior Court of the
State of California
for the County of
Los Angeles

APPENDIX D

Second Appellate District,
Division Five, No. B122446
S074717

IN THE SUPREME COURT OF CALIFORNIA

BLUE CROSS OF CALIFORNIA Et Al.,
Petitioners

v.

LOS ANGELES COUNTY SUPERIOR COURT,
Respondent

ELIZABETH FARQUHAR, Real Party In Interest

(Filed Jan. 13, 1999)

Petition for review DENIED.

The requests for an order directing depublication of the opinion are denied.

/s/ GEORGE
Chief Justice

APPENDIX E – STATUTORY ADDENDUM

UNITED STATES CONSTITUTION (USCS 1998)
ARTICLE VI, CLAUSE 2. SUPREME LAW OF LAND

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

UNITED STATES CODE (USCS 1998)
TITLE 9. ARBITRATION
CHAPTER 1 – GENERAL PROVISIONS

§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions," as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce," as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or

any other class of workers engaged in foreign or interstate commerce.

§ 2. Validity, irrevocability and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged

to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

* * *

§ 6. Application heard as motion

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

TITLE 28 – JUDICIARY AND JUDICIAL PROCEDURE (USCS 1998)

PART IV – JURISDICTION AND VENUE

§ 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn

in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

PART V – PROCEDURE

§ 2101. Supreme Court; time for appeal or certiorari; docketing; stay

* * *

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

* * *

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the

judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

* * *

FEDERAL RULES OF CIVIL PROCEDURE (USCS 1998)

PART VI – TRIALS

Rule 42. Consolidation; Separate Trials

(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

* * *

CALIFORNIA CODE OF CIVIL PROCEDURE (WEST'S 1999)

TITLE 9 – ARBITRATION
CHAPTER 2 – ENFORCEMENT OF ARBITRATION AGREEMENTS

§ 1281.3. Consolidation of Separate Arbitration Proceedings.

A party to an arbitration agreement may petition the court to consolidate separate arbitration

proceedings, and the court may order consolidation of separate arbitration proceedings when:

(1) Separate arbitration agreements or proceedings exist between the same parties; or one party is a party to a separate arbitration agreement or proceeding with a third party; and

(2) The disputes arise from the same transactions or series of related transactions; and

(3) There is common issue or issues of law or fact creating the possibility of conflicting rulings by more than one arbitrator or panel of arbitrators.

If all of the applicable arbitration agreements name the same arbitrator, arbitration panel, or arbitration tribunal, the court, if it orders consolidation, shall order all matters to be heard before the arbitrator, panel, or tribunal agreed to by the parties. If the applicable arbitration agreements name separate arbitrators, panels, or tribunals, the court, if it orders consolidation, shall, in the absence of an agreed method of selection by all parties to the consolidated arbitration, appoint an arbitrator in accord with the procedures set forth in Section 1281.6.

In the event that the arbitration agreements in consolidated proceedings contain inconsistent provisions, the court shall resolve such conflicts and determine the rights and duties of the various parties to achieve substantial justice under all the circumstances.

The court may exercise its discretion under this section to deny consolidation of separate arbitration proceedings or to consolidate separate arbitration proceedings only as to certain issues, leaving other issues to be resolved in separate proceedings.

This section shall not be applicable to an agreement to arbitrate disputes as to the professional negligence of a health care provider made pursuant to Section 1295.

§ 1281.6 Appointment of Arbitrators.

If the arbitration agreement provides a method of appointing an arbitrator, that method shall be followed. If the arbitration agreement does not provide a method for appointing an arbitration, the parties to the agreement who seek arbitration and against whom arbitration is sought may agree on a method of appointing an arbitrator and that method shall be followed. In the absence of an agreed method, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails to act and his or her successor has not been appointed, the court, on petition of a party to the arbitration agreement, shall appoint the arbitrator.

When a petition is made to the court to appoint a neutral arbitrator, the court shall nominate five persons from lists of persons supplied jointly by the parties to the arbitration or obtained from a governmental agency concerned with arbitration or private disinterested association concerned with arbitration. The parties to the agreement who seek arbitration and against whom arbitration is sought may within five days of receipt of notice of the nominees from the court jointly select the arbitrator whether or not the arbitrator is among the nominees. If the parties fail to select an arbitrator within the five-day period, the court shall appoint the arbitrator from the nominees.

* * *

TITLE 9.1 – ARBITRATION OF MEDICAL MALPRACTICE

§ 1295. Arbitration Provision in Medical Services Contract – Language

(a) Any contract for medical services which contains a provision for arbitration of any dispute as to professional negligence of a health care provider shall have such provision as the first article of the contract and shall be expressed in the following language: "It is understood that any dispute as to medical malpractice, that is as to whether unnecessary or unauthorized or were improperly, negligently or incompetently rendered, will be determined by submission to arbitration as provided by California law, and not by a lawsuit or resort to court process except as California law provides for judicial review of arbitration proceedings. Both parties to this contract, by entering into it, are giving up their constitutional right to have any such dispute decided in a court of law before a jury, and instead are accepting the use of arbitration."

(b) Immediately before the signature line provided for the individual contracting for the medical services must appear the following in at least 10-point bold red type:

"NOTICE: BY SIGNING THIS CONTRACT YOU ARE AGREEING TO HAVE ANY ISSUE OF MEDICAL MALPRACTICE DECIDED BY NEUTRAL ARBITRATION AND YOU ARE GIVING UP YOUR RIGHT TO A JURY OR COURT TRIAL. SEE ARTICLE 1 OF THIS CONTRACT."

(c) Once signed, such a contract governs all subsequent open-book account transactions for medical services for which the contract was signed until or unless rescinded by written notice within 30 days of signature. Written notice of such rescission may be given by a guardian or conservator of the patient if the patient is incapacitated or a minor.

(d) Where the contract is one for medical services to a minor, it shall not be subject to disaffirmance if signed by the minor's parent or legal guardian.

(e) Such a contract is not a contract of adhesion, nor unconscionable nor otherwise improper, where it complies with subdivisions (a), (b) and (c) of this section.

(f) Subdivisions (a), (b), and (c) shall not apply to any health care service plan contract offered by an organization registered pursuant to Article 2.5 (commencing with Section 12530) of Division 3 of Title 2 of the Government Code, or licensed pursuant to Chapter 2.2 (commencing with Section 1340) of Division 2 of the Health and Safety Code, which contains an arbitration agreement if the plan complies with paragraph (10) of subdivision (a) of Section 1363 of the Health and Safety Code, or otherwise has a procedure for notifying prospective subscribers of the fact that the plan has an arbitration provision and the plan contracts conform to subdivision (h) of Section 1373 of the Health and Safety Code.

(g) For the purposes of this section:

(1) "Health care provider" means any person licensed or certified pursuant to Division

2 (commencing with Section 500) of the Business and Professions Code, or licensed pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or licensed pursuant to Chapter 2.5 (commencing with Section 1440) of Division 2 of the Health and Safety Code; and any clinic, health dispensary, or health facility, licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code. "Health care provider" includes the legal representatives of a health care provider.

(2) "Professional negligence" means a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital.

CALIFORNIA HEALTH & SAFETY CODE (WEST'S 1999)
CHAPTER 2.2 – HEALTH CARE SERVICE PLANS
ARTICLE 1 – GENERAL

§ 1340. Citation

This chapter shall be known and may be cited as the Knox-Keene Health Care Services Plan Act of 1975.

§ 1345. Definitions

As used in this chapter:

* * *

(e) "Group contract" means a contract which by its terms limits the eligibility of subscribers and enrollees to a specified group.

(f) "Health care service plan" or "specialized health care service plan" means either of the following:

(1) Any person who undertakes to arrange for the provision of health care services to subscribers or enrollees, or to pay for or to reimburse any part of the cost for those services, in return for a prepaid or periodic charge paid by or on behalf of the subscribers or enrollees.

(2) Any person, whether located within or outside of this state, who solicits or contracts with a subscriber or enrollee in this state to pay for or reimburse any part of the cost of, or who undertakes to arrange or arranges for, the provision of health care services that are to be provided wholly or in part in a foreign country in return for a prepaid or periodic charge paid by or on behalf of the subscriber or enrollee.

* * *

(j) "Person" means any person, individual, firm, association, organization, partnership, business trust, foundation, labor organization, corporation, limited liability company, public agency, or political subdivision of the state.

* * *

(o) "Specialized health care service plan contract" means a contract for health care services in a single specialized area of health care, including dental care, for subscribers or enrollees, or which pays for or which reimburses any part of the cost for those services, in return for a prepaid or periodic charge paid by or on behalf of the subscribers or enrollees.

(p) "Subscriber" means the person who is responsible for payment to a plan or whose employment or other status, except for family dependency, is the basis for eligibility for membership in the plan.

(q) Unless the context indicates otherwise, "plan" refers to health care service plans and specialized health care service plans.

(r) "Plan contract" means a contract between a plan and its subscribers or enrollees or a person contracting on their behalf pursuant to which health care services, including basic health care services, are furnished; and unless the context otherwise indicates it includes specialized health care service plan contracts; and unless the context otherwise indicates it includes group contracts.

* * *

ARTICLE 3.1 – SMALL EMPLOYER GROUP ACCESS TO CONTRACTS FOR HEALTH CARE SERVICES

§ 1357.51. Preexisting conditions; exclusions prohibited; waiting or affiliation periods; waivered conditions

(a) No plan contract that covers three or more enrollees shall exclude coverage for any individual on the basis of a preexisting condition provision for a period greater than six months following the individual's effective date of coverage. Preexisting condition provisions contained in plan contracts may relate only to conditions for which medical advice, diagnosis, care, or treatment, including use of prescription drugs, was recommended or received from a licensed health practitioner during the six months immediately preceding the effective date of coverage.

(b) No plan contract that covers one or two individuals shall exclude coverage on the basis of a preexisting condition provision for a period greater than 12 months following the individual's effective date of coverage, nor shall limit or exclude coverage for a specific enrollee by type of illness, treatment, medical condition, or accident, except for satisfaction of a preexisting condition clause pursuant to this article. Preexisting condition provisions contained in plan contracts may relate only to conditions for which medical advice, diagnosis, care, or treatment, including use of prescription drugs, was recommended or received from a licensed health practitioner during the 12 months immediately preceding the effective date of coverage.

(c) A plan that does not utilize a preexisting condition provision may impose a waiting or affiliation period not to exceed 60 days, before the coverage issued subject to this article shall become effective. During the waiting or affiliation period, the plan is not required to provide health care services and no premium shall be charged to the subscriber or enrollee.

(d) A plan that does not utilize a preexisting condition provision in plan contracts that cover one or two individuals may impose a contract provision excluding coverage for waivered conditions. No plan may exclude coverage on the basis of a waivered condition for a period greater than 12 months following the individual's effective date of coverage. A waivered condition provision contained in plan contracts may relate only to conditions for which medical advice, diagnosis, care, or treatment, including use of prescription drugs, was recommended or received from a licensed health practitioner during the 12 months immediately preceding the effective date of coverage.

(e) In determining whether a preexisting condition provision, a waivered condition provision, or a waiting or affiliation period applies to any enrollee, a plan shall credit the time the enrollee was covered under creditable coverage, provided the enrollee becomes eligible for coverage under the succeeding plan contract within 62 days of termination of prior coverage, exclusive of any waiting or affiliation period, and applies for coverage under the succeeding plan within the applicable enrollment period. A plan shall also credit any time an eligible employee must wait before enrolling in the plan, including

any postenrollment or employer-imposed waiting or affiliation period.

However, if a person's employment has ended, the availability of health coverage offered through employment or sponsored by an employer has terminated, or an employer's contribution toward health coverage has terminated, a plan shall credit the time the person was covered under creditable coverage if the person becomes eligible for health coverage offered through employment or sponsored by an employer within 180 days, exclusive of any waiting or affiliation period, and applies for coverage under the succeeding plan contract within the applicable enrollment period.

(f) No plan shall exclude late enrollees from coverage for more than 12 months from the date of the late enrollee's application for coverage. No plan shall require any premium or other periodic charge to be paid by or on behalf of a late enrollee during the period of exclusion from coverage permitted by this subdivision.

(g) A health care service plan issuing group coverage may not impose a preexisting condition exclusion to the following:

(1) To a newborn individual, who, as of the last day of the 30-day period beginning with the date of birth, has applied for coverage through the employer-sponsored plan.

(2) To a child who is adopted or placed for adoption before attaining 18 years of age and who, as of the last day of the 30-day period beginning with the date of adoption or placement for adoption, is covered under creditable coverage and applies for coverage through the

employer-sponsored plan. This provision shall not apply if, for 63 continuous days, the child is not covered under any creditable coverage.

(3) To a condition relating to benefits for pregnancy or maternity care.

(h) An individual's period of creditable coverage shall be certified pursuant to subdivision (e) of Section 2701 of Title XXVII of the federal Public Health Services Act, 42 U.S.C. Sec. 300gg(e).

§ 1363.1 Binding arbitration included as contract term; required disclosures and conditions

Any health care service plan that includes terms that require binding arbitration to settle disputes and that restrict, or provide for a waiver of, the right to a jury trial shall include, in clear and understandable language, a disclosure that meets all of the following conditions:

(a) The disclosure shall clearly state whether the plan uses binding arbitration to settle disputes, including specifically whether the plan uses binding arbitration to settle claims of medical malpractice.

(b) The disclosure shall appear as a separate article in the agreement issued to the employer group or individual subscriber and shall be prominently displayed on the enrollment form signed by each subscriber or enrollee.

(c) The disclosure shall clearly state whether the subscriber or enrollee is waiving his or her right to a jury trial for medical malpractice, other disputes relating to the delivery

of service under the plan, or both, and shall be substantially expressed in the wording provided in subdivision (a) of Section 1295 of the Code of Civil Procedure.

(d) In any contract or enrollment agreement for a health care service plan, the disclosure required by this section shall be displayed immediately before the signature line provided for the representative of the group contracting with a health care service plan and immediately before the signature line provided for the individual enrolling in the health care service plan.

MASSACHUSETTS GENERAL LAWS ANN. (WEST'S 1999)

PART III – COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES
TITLE IV – CERTAIN WRITS AND PROCEEDINGS IN SPECIAL CASES
CHAPTER 251 – UNIFORM ARBITRATION ACT FOR COMMERCIAL DISPUTES

2A. Consolidation or Severance of Arbitration Proceedings

A party aggrieved by the failure or refusal of another to agree to consolidate one arbitration proceeding with another or others, for which the method of appointment of the arbitrator or arbitrators is the same, or to serve one arbitration proceeding from another or others, may apply to the superior court for an order for such consolidation or such severance. The court shall proceed summarily to the determination of the issue so raised. If a claimant under section twenty-nine of chapter one hundred and forty-

nine applies for an order for consolidation or severance of such proceedings, the issue shall be decided under the applicable provisions of said section twenty-nine of said chapter one hundred and forty-nine governing consolidation or severance of such actions; otherwise the issue shall be decided under the Massachusetts Rules of Civil Procedure governing consolidation and severance of trials and the court shall issue an order accordingly. No provisions in any arbitration agreement shall bar or prevent action by the court under this section.

HISTORY: 1977, 414

APPENDIX F

AMERICAN ARBITRATION ASSOCIATION COMMERCIAL ARBITRATION RULES (1998)

§ R-1. Agreement of Parties

The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter AAA) under its Commercial Arbitration Rules or for arbitration by the AAA of a domestic commercial dispute without specifying particular rules. These rules and any amendment of them shall apply in the form in effect at the time the demand for arbitration or submission agreement is received by the AAA. The parties, by written agreement, may vary the procedures set forth in these rules.

* * *

§ R-4. National Panel of Arbitrators

The AAA shall establish and maintain a National Panel of Commercial Arbitrators and shall appoint arbitrators as provided in these rules. The term "arbitrator" in these rules refers to the arbitration panel, whether composed of one or more arbitrators and whether the arbitrators are neutral or party-appointed.

* * *

§ R-8. Jurisdiction

(a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any

objections with respect to the existence, scope or validity of the arbitration agreement.

(b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

(c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

* * *

§ R-13. Appointment from Panel

If the parties have not appointed an arbitrator and have not provided any other method of appointment, the arbitrator shall be appointed in the following manner:

(a) Immediately after the filing of the submission or the answering statement or the expiration of the time within which the answering statement is to be filed, the AAA shall send simultaneously to each party to the dispute an identical list of names of persons chosen from the panel. The parties are encouraged to agree to an arbitrator from the submitted list and to advise the AAA of their agreement.

(b) If the parties are unable to agree upon an arbitrator, each party to the dispute shall have 15 days from the transmittal date in which to strike names objected to, number the remaining names in order of preference, and return the list to the AAA. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an arbitrator to serve. If the parties fail to agree on any of the persons named, or if for any other reason the appointment cannot be made from the submitted lists, the AAA shall have the power to make the appointment from among other members of the panel without the submission of additional lists.

(c) Unless the parties have agreed otherwise no later than 15 days after the commencement of an arbitration, if the notice of arbitration names two or more claimants or two or more respondents, the AAA shall appoint all the arbitrators.

§ R-14. Direct Appointment by a Party

(a) If the agreement of the parties names an arbitrator or specifies a method of appointing an arbitrator, the designation or method shall be followed. The notice of appointment, with the name and address of the arbitrator, shall be filed with the AAA by the appointing party. Upon the request of any appointing party, the AAA shall submit a list of members of the panel from which the party may, if it so desires make the appointment.

(b) If the agreement specifies a period of time within which an arbitrator shall be appointed and any party fails to make the appointment within that period, the AAA shall make the appointment.

(c) If no period of time is specified in the agreement, the AAA shall notify the party to make the appointment. If within 15 days after such notice has been sent, an arbitrator has not been appointed by a party, the AAA shall make the appointment.

§ R-15. Appointment of Neutral Arbitrator by Party-Appointed Arbitrators or Parties

(a) If the parties have selected party-appointed arbitrators, or if such arbitrators have been appointed as provided in Section R-14, and the parties have authorized them to appoint a neutral arbitrator within a specified time and no appointment is made within that time or any agreed extension, the AAA may appoint a neutral arbitrator, who shall act as chairperson.

(b) If no period of time is specified for appointment of the neutral arbitrator and the party-appointed arbitrators or the parties do not make the appointment within 15 days from the date of the appointment of the last party-appointed arbitrator, the AAA may appoint the neutral arbitrator, who shall act as chairperson.

(c) If the parties have agreed that their party-appointed arbitrators shall appoint the neutral arbitrator from the panel, the AAA shall furnish to the party-appointed arbitrators, in the manner provided in Section R-13, a list selected

from the panel, and the appointment of the neutral arbitrator shall be made as provided in that section.

* * *

§ R-17. Number of Arbitrators

If the arbitration agreement does not specify the number of arbitrators, the dispute shall be heard and determined by one arbitrator, unless the AAA, in its discretion, directs that three arbitrators be appointed. The parties may request three arbitrators in their demand or answer, which request the AAA will consider in exercising its discretion regarding the number of arbitrators appointed to the dispute.

* * *

§ R-23. Exchanges of Information

(a) At the request of any party or at the discretion of the arbitrator, consistent with the expedited nature of arbitration, the arbitrator may direct (i) the production of documents and other information, and (ii) the identification of any witnesses to be called.

(b) At least five (5) business days prior to the hearing, the parties shall exchange copies of all exhibits they intend to submit at the hearing.

(c) The arbitrator is authorized to resolve any disputes concerning the exchange of information.

* * *

(2)

No. 98-1636

Supreme Court, U.S.
FILED
MAY 12 1999
CLERK

In The

Supreme Court of the United States

BLUE CROSS OF CALIFORNIA, CALIFORNIACARE HEALTH PLANS, WELLPOINT HEALTH NETWORKS INC., A California Corporation,

Petitioners,

vs.

CALIFORNIA SUPERIOR COURT; ELIZABETH FARQUHAR and LAURIE WINETT, individually, on behalf of themselves and all others similarly situated,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, Second Appellate District

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the court should dismiss this appeal from the denial of an interlocutory writ in a case where there has been no final judgment of any kind.

Whether the Federal Arbitration Act, 9 U.S.C. §1, preempts California law that is not hostile to arbitration, nor hostile to the parties' stated agreement to arbitrate.

Whether the Federal Arbitration Act pre-empts all state laws that are not procedurally identical to it, even where that state law encourages arbitration and supports the parties' agreement to arbitrate.

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JURISDICTION – OBJECTION

This Court lacks jurisdiction to grant Blue Cross's petition. Contrary to Blue Cross's reliance on 28 U.S.C. §1257(a), there has been no "final judgment" in this case. Consequently, Respondents hereby object to the petition based upon this Court's lack of jurisdiction. This petition seeks review of an interlocutory opinion of a California Court of Appeal. That opinion is not reviewable by this Court, because no "final judgment" has been entered in this case as that requirement is set forth in the case of *Jefferson v. City of Tarrant, Alabama*, 522 U.S. 75 (1997). Respondents submit, therefore, that the subject petition must be dismissed. This objection is briefed in further detail under the section entitled "REASONS FOR DISMISSING OR DENYING THE PETITION."

INTRODUCTION

During the pendency of this (not yet certified) consumer class action against Blue Cross of California *et al.* (collectively "Blue Cross"), an interlocutory writ proceeding was taken up by Petitioner Blue Cross to the California Court of Appeal. A published opinion resulted concerning the parties' skirmish over whether the parties should be permitted to conduct pretrial discovery on the class issues. The California Court of Appeal ruled adversely to Blue Cross, affirming the trial court's denial of Blue Cross's motion to stay the litigation. The court's ruling was based on the grounds that the pretrial discovery on the class issues could proceed, because the court noted that it intended to refer the case to the American

Arbitration Association ("AAA") for a classwide arbitration, if the court ruled favorably on the plaintiffs' motion for class certification. (Petitioners' App. 40)

Blue Cross then filed a petition for review in the California Supreme Court to have the appellate court's opinion reviewed. However, the California Supreme court denied the petition for review, leaving the trial court's order denying the motion to stay the litigation to stand. Consequently, discovery on the class issues was permitted to go forward.

By way of this petition, Blue Cross is challenging the California Court of Appeal's interlocutory opinion, which opinion permits the parties to conduct discovery on the class issues. However, no final judgment has been entered in this case. In fact, the trial court has not even heard the plaintiffs' motion to certify the class and to certify the plaintiffs as the representatives of the class.

OPINIONS BELOW

The California Court of Appeal, Second Appellate District, Division Five issued an opinion concerning the interlocutory writ proceeding on October 6, 1998. The same is reported as *Blue Cross of California v. Superior Court*, 67 Cal.App.4th 42, 78 Cal.Rptr.2d 779 (1998). Blue Cross filed a petition for review in the California Supreme Court. The California Supreme Court denied the petition for review. The denial was entered on January 13, 1999. Following the California Supreme Court's denial of the petition for review, the California Court of Appeal issued a Remittitur through which jurisdiction over the

case was returned to the trial court for further proceedings. The trial court held such jurisdiction, until the subject petition for a writ of certiorari was filed by Blue Cross. The California trial court has not yet conducted a hearing nor entered any orders concerning the Respondents' motion for class certification, which motion seeks an order certifying the class and certifying the plaintiffs as the representatives of that class. Further, no final judgment has been entered in this case.

STATEMENT OF THE CASE

The two named plaintiffs, Elizabeth Farquhar and Laurie Winett, are pursuing this consumer class action against Blue Cross. The named plaintiffs are the Respondents to this petition. The plaintiffs allege in the complaint that Blue Cross has "engaged in a widespread practice of selling and administering health plans which violate laws concerning pre-existing condition exclusions, waiting period exclusions, waivered condition exclusions, and temporary exclusions." Blue Cross answered the complaint alleging, in part, that plaintiffs were required by contract to resolve their claims through binding arbitration.

The arbitration provision is in Blue Cross's standardized health plan contract. In the contract booklets entitled the "Prudent Buyer Plan Service Agreement and Combined Evidence of Coverage and Disclosure Form" it states: "PART VII BINDING ARBITRATION [¶] A. Any dispute or claim, of whatever nature, arising out of, in connection with, or in relation to this Agreement or

breach thereof, or in relation to care or delivery of care, including any claim based on contract, tort or statute, must be resolved by arbitration if the amount sought exceeds the jurisdictional limit of the small claims court [¶] B. Any disputes regarding a claim for damages within the jurisdictional limits of the small claims court will be resolved in such court. [¶] C. The arbitration is begun by the Member making written demand on Blue Cross. The arbitration will be conducted by the American Arbitration Association according to its commercial rules of arbitration. The arbitration shall be held in the state of California. [¶] D. The Member and Blue Cross agree to be bound by the arbitration provision and acknowledge that they are giving up their right to a trial by court or jury. [¶] E. The arbitration findings will be final and binding except to the extent that California or Federal law provide for the judicial review of arbitration proceedings."

Blue Cross filed a petition in the trial court to compel arbitration of the individual plaintiffs' claims and a motion to stay the litigation. Plaintiffs opposed the petition to compel arbitration and the motion to stay the litigation, including all classwide discovery. Plaintiffs argued that the motion to stay the classwide discovery should be denied, because California law is favorable to arbitration and California procedural law concerning the means of conducting the arbitration was not preempted by the act. The trial court granted Blue Cross's petition to compel arbitration and to stay judicial proceedings *as to the individual plaintiffs*, but denied Blue Cross's motion to stay the litigation as a whole. The trial court ordered in part: "The Motion to Stay Judicial Proceedings is denied as to the class claims alleged in the Complaint. Discovery

shall continue as to the class claims for purposes of a possible class certification motion and, . . . if a class is certified, the class claims will be referred to class-wide arbitration . . . ", which is permitted under California law. (Petitioners' App. 40)

Blue Cross then filed an interlocutory petition for a writ of mandate, prohibition or other appropriate relief. Blue Cross contended that the act preempts California arbitration law and preempts California procedural law that permits classwide arbitration. It argued that the trial court had therefore erred in denying the motion to stay the litigation as a whole. Blue Cross supported its request for interlocutory relief on the grounds that if classwide arbitration is not allowed [as a matter of federal law], then the parties would waste judicial resources and be burdened with unnecessary expenditure of time and money. (Petitioners' App. 5) The California Court of Appeal issued an order to show cause why the relief prayed for in the petition should not be granted. The California Court of Appeal identified the issue as whether the act prohibits classwide arbitration in cases where the agreement between the parties is silent on the issue of a classwide arbitration and where the state decisional authority specifically provides for such classwide arbitration. The California Court of Appeal held a trial court did possess the authority to enter an order denying a request to stay class discovery on the grounds that a trial court may, under appropriate circumstances, certify a class and order arbitration on a classwide basis. (Petitioners' App. 34) The California Court of Appeal deferred

any ruling as to whether this case presents the appropriate circumstances for a classwide arbitration as premature. (Petitioners' App. 33)

Additionally, the California Court of Appeal explained: "[¶] Blue Cross also contends that an order compelling classwide arbitration in this case would interfere with the parties' intentions; it asserts it bargained for individual arbitration conducted according to the rules of the American Arbitration Association (AAA), not this 'hybrid' classwide arbitration requiring judicial intervention. ***This argument is premature.*** [emphasis added] The only issue before this court is whether the *Keating* rule is preempted by the act. No order has been entered certifying a class. No order has been entered requiring classwide arbitration. (E.g. *Gainey v. Occidental Land Research* (1986), 186 Cal.App.3d 1051, 1054-1055) Whether classwide arbitration is appropriate in this matter is a question left to the trial court's discretion upon consideration of a variety of factors. (*Keating v. Superior Court, supra,* 31 Cal.3d at p. 613; *Izzi v. Mesquite Country Club, supra,* 186 Cal.App.3d 1309, at pp. 1314, 1322 (1986).) Moreover, under *Keating,* an arbitration agreement that is silent as to classwide arbitration is amenable to such procedure." (Petitioners' App. 33)

REASONS FOR DISMISSING OR DENYING THIS PETITION

This court should deny this petition on the grounds there is no jurisdiction. This court may not review the interlocutory opinion issued by the California Court of

Appeal in this case, because this case has not yet proceeded to a "final judgment" as that term is used in 28 U.S.C. §1257(a). *Jefferson v. City of Tarrant, Alabama,* 522 U.S. 75 (1997). Additionally, the petition should be denied because it does not raise issues that warrant review by this court.

Significantly, Blue Cross has made a factually misleading statement in the subject petition. (Rule 15.6) Blue Cross asserts that "[the AAA's commercial rules] do not provide for classwide arbitration . . . " (petition, p. 10) However, Blue Cross is glossing over the fact that the California Court of Appeal found Blue Cross failed to make a sufficient showing to support such a finding. The California Court of Appeal found: "[f]urther, there has been no showing that an order compelling classwide arbitration would conflict with the agreement to proceed under AAA rules." (Petitioners' App. 33)

This case is not yet far enough along in the proceedings to provide a complete evidentiary record to address the *Keating* issue. This case has not yet proceeded to a hearing and ruling in the trial court, or any court, concerning plaintiffs' motion to have the class certified. Because the trial court has not made factual findings concerning the certification of the class, this petition may be rendered moot when this case is permitted to go forward in the lower courts. Therefore, even if there were a "final judgment" in this case (which there is not), this case is not a good vehicle for addressing the concerns raised by Blue Cross.

Finally, the decision of the California Court of Appeal does not conflict with the act, or even conflict with the federal authorities relied upon by Blue Cross.

I. THERE IS NO JURISDICTION

This Court lacks jurisdiction to grant Blue Cross's petition. Contrary to Blue Cross's reliance on 28 U.S.C. §1257(a), there has been no "final judgment" in this case. Consequently, Respondents hereby object to the petition based upon this Court's lack of jurisdiction. This petition focuses on an interlocutory opinion of a California Court of Appeal. That opinion is not reviewable by this Court, because there has been no "final judgment" in this case as that requirement is set forth in the case of *Jefferson v. City of Tarrant, Alabama*, 522 U.S. 75 (1997). Respondents submit, therefore, that this subject petition must be dismissed.

The text of 28 U.S.C. §1257(a) is set forth in the Petitioners' Appendix at pages "App. 47-48." This Court has held that: "this provision establishes a firm final judgment rule. To be reviewable by this Court, a state-court judgment must be final 'in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.' *Market Street R. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551, 65 S.Ct. 770, 773, 89 L.Ed. 1171 (1945). As [this Court] has recognized, the finality rule 'is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal

system.' *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124, 65 S.Ct. 1475, 1478, 89 L.Ed. 509 (1945)." *Jefferson v. City of Tarrant, Alabama*, 522 U.S. 75, 118 S.Ct. 481, 485-486 (1997).

As applied here, the California Court of Appeal's opinion has not resulted in a "final judgment." It is an avowedly interlocutory affirmance of a trial court's interlocutory order permitting the parties to conduct pretrial discovery. It is an interlocutory affirmance that the plaintiffs have a right to gather evidence in support of their complaint's allegations regarding the presence of the traditional elements of a class action case, such as numerosity, commonality, typicality, adequacy of representation, and so on. (Petitioners' App. 40) In fact, the plaintiffs' motion to certify the class has not yet even been heard or ruled upon by the trial court, much less the final court of the state.

Moreover, this is not a case that comes within the limited set of situations in which there is finality as to the federal issue despite the ordering of further proceedings in the lower state courts. This is not a case in which "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 480, 95 S.Ct. 1029, 1038, 43 L.Ed.2d 328 (1975). Rather, the resolution of the state-law claims could effectively moot the federal-law question raised here. Most notably, the motion for class certification could be denied or Blue Cross could voluntarily relinquish its right to object to class certification in the future in the state court proceedings. And, the same issues, such as whether the act preempts California law,

may be revisited in a subsequent appeal. The interlocutory decision may be subject to a further review or correction by the California Supreme Court. This case presents "the typical situation in which the state courts have resolved some but not all of the Petitioners' claims." *Jefferson v. City of Tarrant, Alabama*, 522 U.S. 75, 118 S.Ct. 481, 486 (1997). Because the California Supreme Court has not yet rendered a final judgment, this Court lacks jurisdiction to review the decision on the pretrial discovery issue.

II. THE DECISION OF THE CALIFORNIA COURT OF APPEAL DOES NOT CONFLICT WITH THE ACT OR EVEN CONFLICT WITH THE FEDERAL AUTHORITIES RELIED UPON BY BLUE CROSS

The facts of this case simply do not show that there is a conflict between federal law and state law. Contrary to the protestations of Blue Cross, the California courts have not run afoul of the act's requirement that an arbitration clause must be placed on equal footing with the other terms of the contract. The California courts in this case have simply enforced the bargain struck between the parties concerning the right to arbitrate. Factually, this contract was silent concerning a classwide arbitration. (Petitioners' App. 34) The California trial court thus found that the parties did not bargain away the right to file a class action. (Petitioners' App. 41) The California Appellate Court held that where the agreement is silent on the classwide arbitration issue, the trial court may order a classwide arbitration because state decisional authority specifically provides for such arbitration. (Petitioners' App. 34)

Federal law does not prohibit or restrict "classwide arbitration" to anything like the extent suggested by Blue Cross. Under federal law, as articulated in *Champ v. Siegel Trading Co., Inc.*, 55 F.3d 269 (7th Cir. 1995), and the cases on which the Seventh Circuit relied, there was no preexisting authority for a classwide arbitration in that particular jurisdiction of the Seventh Circuit. Under those circumstances, the *Champ* court refused to read such authority into the parties' arbitration agreement. Here, on the other hand, the state law of California authorizes classwide arbitration in California. *Keating v. Superior Court*, 31 Cal.3d 584, 645 P.2d 1192, 183 Cal.Rptr. 360 (1982), *rev'd in part and appeal dismissed in part sub nom., Southland Corp. v. Keating*, 465 U.S. 1 (1984). Blue Cross does not and cannot contend that the act categorically prohibits classwide arbitration, thus there is simply no basis upon which to invoke the very limited pre-emption provided in the act.

It is simply not true that unless the contract in this case expressly defines "any disputes" to *include* a "classwide dispute," the class procedures and the right to a classwide arbitration are precluded by the contract or the act. Blue Cross drafted the contract and did not exclude classwide disputes from "any disputes." Thus, the California court ruled correctly, and Blue Cross is disappointed by the result. The construction of the terms of an arbitration agreement, for purposes of applying the act, may be made under an evenhanded application of the state's common law of contract, and by the application of the state's procedures for implementing the arbitration agreement. *Volt Inf. Sciences v. Leland Stanford Jr. U.*, 489 U.S. 468, 478-479 (1989). This Court allows parties in

arbitration agreements to choose to apply state law. *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, fn. 4 (1995). That is all that happened here. Blue Cross drafted the agreement, and chose California law as controlling. That law favors arbitration, thus precluding pre-emption, and permits the arbitration to take a form that the parties did not preclude. Where Blue Cross is getting exactly what it bargained for, arbitration under California law, it has no reason to be before this or any other court.

As applied in this case, the California court correctly construed the terms of the contract to permit a classwide arbitration under California's procedural rules. If the case were in a federal forum, the result may have been the same despite the application of the rules of federal civil procedure. There is no reason to conclude a federal court applying the federal procedural rules would necessarily reach a different result than a state court reached under the application of California's procedural rules. Most significantly, the trial court noted that the court's ruling was consistent with what the result would have been, assuming the federal procedures required a strict construction of the arbitration agreement. In other words, the court found federal law would also permit a classwide arbitration in this case. (Petitioners' App. 41-42) Simply put, there is no conflict between federal law and state law in this case. Federal law encourages the arbitration the parties agreed to, and California law does likewise. There is no conflict.

The California trial court held: "7. The federal authorities cited hold that the FAA was designed to counter judicial reluctance against enforcing arbitration clauses, and to place arbitration agreements 'on the same

footing' as other contracts. Assuming strict construction is the appropriate approach, it appears to this Court that strict construction requires that it enforce the contract as written, but take away no more than was bargained for. That is how the Court would construe any other contract provision and is what California has historically done with arbitration agreements. *See, Izz[i], supra.*" (Petitioners' App. 42)

Significantly, this Court has previously held that the act does not prevent the enforcement of agreements to arbitrate under state procedural law. *Volt Inf. Sciences v. Leland Stanford Jr. U.*, 489 U.S. 468, 478-479 (1989). Blue Cross does not dispute that the federal act permits classwide arbitration of disputes involving a private agreement to arbitrate in appropriate cases. Blue Cross does not contend that the act categorically prohibits classwide arbitrations.

"There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforcability, according to their terms, of private agreements to arbitrate." *Volt Inf. Sciences v. Leland Stanford Jr. U.*, 489 U.S. 468, at p. 476. Moreover, "[the act] itself contains no provision designed to deal with the special practical problems that arise in multiparty contractual disputes when some or all of the contracts at issue include agreements to arbitrate. California has taken the lead in fashioning a legislative response to this problem, by giving courts authority to consolidate or stay arbitration proceedings in these situations in order to minimize the potential for contradictory judgments. [Citation.]" *Volt Inf. Sciences v. Leland Stanford Jr. U.*, 489 U.S. 468, at p. 476, fn. 5.

Until that authority is overturned, the parties may be presumed to have intended that the legal rights existing

at the time the parties entered the agreement would be enforceable as part of the implied terms of the contract.

In this case both the act and the California decisional authority permit a trial court to require a classwide arbitration where the parties have agreed to an arbitration of "any dispute." Blue Cross has not shown there is a conflict between federal and state law which warrants review by this Court.

CONCLUSION

For the reasons set forth above, the Respondents respectfully request this Court to dismiss or deny the petition.

Respectfully submitted,

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In The

Supreme Court of the United States

BLUE CROSS OF CALIFORNIA, CALIFORNIACARE HEALTH PLANS, WELLPOINT HEALTH NETWORKS INC., A California Corporation,

Petitioners,

vs.

CALIFORNIA SUPERIOR COURT; ELIZABETH FARQUHAR and LAURIE WINETT, individually, on behalf of themselves and all others similarly situated,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, Second Appellate District

BRIEF OF AMICI CURIAE AMERICAN FINANCIAL SERVICES ASSOCIATION, CALIFORNIA FINANCIAL SERVICES ASSOCIATION AND CALIFORNIA BANKERS ASSOCIATION IN SUPPORT OF PETITIONERS

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BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONERS

The American Financial Services Association ("AFSA"), the California Financial Services Association ("CFSA") and the California Bankers Association ("CBA") submit this brief of amici curiae in support of petitioners Blue Cross of California, *et al.* This brief is filed under Rule 37.3(a).[1]

I

INTEREST OF AMICI CURIAE

AFSA is the nation's largest trade association representing market-funded providers of financial services to consumers and small businesses. AFSA's members are engaged in extending $200 billion or about 15 to 20 percent of all consumer credit in the United States.

Members of AFSA provide a broad range of financial products and services to consumers throughout the United States, including credit card, checking account, and deposit account services, home mortgage loans, home equity loans, retail installment financing, automobile and mobile home financing, and lines of credit. AFSA members extend consumer credit in California and other states, many under nationwide programs.

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[1] The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the amici curiae, their members, or their counsel made a monetary contribution to the preparation and submission of this brief. The petitioners are not members of either the AFSA or the CFSA.

Similarly CFSA is a trade association representing non-bank corporations and independent lenders licensed by the State of California.

CBA is the principal trade association representing virtually all of the more than 300 California commercial banks. The total assets of CBA members exceed $470 billion.

Increasingly, AFSA, CFSA and CBA members have included arbitration clauses in their consumer credit agreements in order to provide a quick, efficient mechanism for resolving consumer complaints. Usually, those clauses require binding arbitration through a recognized arbitration service provider such as the American Arbitration Association or JAMS/Endispute. Arbitration under their auspices affords both consumers and creditors the benefit of a speedy, uniform procedure for resolving disputes, irrespective of where the consumer resides.

Most consumer credit transactions involve interstate commerce sufficiently to fall within the broad scope of the Federal Arbitration Act.[2] *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273-274, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995). Moreover, most AFSA, CFSA and CBA members' arbitration clauses specifically invoke the FAA to secure uniformity of arbitration procedure in their multistate or nationwide credit programs. By doing so, AFSA, CFSA and CBA members attempt to assure that the enforceability, procedure and result of arbitration will not turn on the peculiarities of any particular state's law. Providing this sort of uniformity for interstate transactions is one of the FAA's recognized purposes. *Id.* at 271.

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[2] 9 U.S.C. § 1, *et seq.*

Paralleling the trend toward use of arbitration clauses in consumer credit contracts has been a large rise in the number of consumer class actions against all types of defendants, including providers of consumer credit. In particular, putative nationwide classes have recently come into fashion with the plaintiffs' bar, as a spate of recent appellate cases attest. E.g., *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227 (9th Cir. 1996); *Andrews v. American Tel. & Tel. Co.*, 95 F.3d 1014 (11th Cir. 1996); *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *In re American Medical Systems, Inc.*, 75 F.3d 1069 (6th Cir. 1996); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995); *Canon U.S.A., Inc., v. Superior Court*, 68 Cal.App.4th 1, 79 Cal Rptr.2d 897 (1998). These parallel increases in class litigation and the use of arbitration clauses lend particular and growing importance to the question raised by this case.

On numerous occasions, AFSA, CFSA and CBA have been granted leave to, and have, filed amici curiae briefs in cases raising issues of concern to the consumer finance industry. AFSA, CFSA and CBA have reviewed the Petition for Writ of Certiorari and the California Court of Appeal opinion. They are familiar with the questions raised and with the parties' arguments regarding them.

II

SUMMARY OF ARGUMENT

In this case, the California Court of Appeal held that, in enforcing an arbitration agreement subject to the FAA a state court may – and, if class certification is otherwise appropriate, must – order the arbitration to proceed on a

class-wide basis. *Blue Cross of California v. Superior Court*, 67 Cal.App.4th 42, 78 Cal. Rptr. 2d 779 (1998) ("Opn.").

The Court of Appeal decision commits the fundamental error of confusing procedure *in court* in a proceeding to compel arbitration with procedure *in arbitration* once arbitration has been compelled.

Under the FAA, states have considerable leeway in specifying the procedures to be followed in their own courts in proceedings to enforce arbitration clauses. *Southland Corp. v. Keating*, 465 U.S. 1, 16, n.10, 104 S.Ct 852, 79 L.Ed.2d 1 (1984). No such leeway is accorded states with respect to the procedure to be followed in the arbitration itself. One of Congress' primary purposes in enacting the FAA was to ensure that private agreements to arbitrate would be enforced *according to their terms. Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995).

Giving the parties *more* arbitration, or a different arbitration procedure than they bargained for, offends the FAA and the Congressional purpose underlying it just as much as giving the parties less arbitration than they agreed to. That is just what the Court of Appeal decision accomplishes. It compels arbitration of many claims together according to a procedure to which the parties did not agree. It clearly does *not* enforce the arbitration agreement according to its terms.

The Court of Appeal's error will adversely affect a large and growing number of cases, encouraging forum-shopping and leading to intractable jurisdictional wrangles between federal and state courts enforcing the same arbitration clauses. In recent years, arbitration clauses

have become commonplace in consumer credit contracts. Creditors are, unfortunately, also the target of an increasing number of class actions. How to proceed when a putative class representative has signed an arbitration clause governed by the FAA is, therefore, a question which will arise with increasing frequency.

According to the Court of Appeal, California state courts are to answer that question by ordering the parties to arbitration on a class-wide basis. Yet, as the Court of Appeal also acknowledged, a federal court enforcing the same arbitration agreement under the same statute, the FAA, will reach a dramatically different result. *Champ v. Siegel Trading Co., Inc.*, 55 F.3d 269, 277 (7th Cir. 1995). It will order arbitration to proceed on an individual basis between the named plaintiff and the defendant, barring resolution of the dispute as a class action. *Id.*

This disuniformity of result is directly contrary to another of Congress' principal purposes in enacting the FAA; viz., fostering uniformity in the enforcement of arbitration clauses. It will encourage and reward forum-shopping. It will create the threat of conflicts between state and federal courts enforcing the same arbitration agreement. It will invite a flood of nationwide class action filings in the courts of those states, like California, that adopt the Court of Appeal's unique and discordant rule allowing courts to order arbitration to proceed on a class-wide basis.

For all of these reasons, amici urge the Court to grant the Petition on the issue of whether the FAA precludes a state court from ordering a class-wide arbitration of

claims pursuant to an arbitration agreement governed by that Act.

III

THE COURT OF APPEAL OPINION CONFLICTS WITH THE FAA AND FEDERAL DECISIONS INTERPRETING IT

This case raises an important question of law under the FAA concerning the arbitrability of class claims. The Court of Appeal decision is more than simply erroneous. It reflects a severe divergence between state and federal courts on how the FAA is to be construed.

The Court of Appeal opinion confuses two critically different sets of procedural rules. One set applies to proceedings in state *court* in a suit to compel arbitration under an agreement subject to the FAA. The other set of rules governs the proceedings in *arbitration*.

This Court has shown great reluctance to mandate the former type of procedure for state courts. In *Southland Corp. v. Keating, supra,* 465 U.S. at 16, n.10, the Court expressed this reluctance while at the same time reaffirming the FAA's broad preemption of state arbitration law:

> In holding that the Arbitration Act pre-empts a state law that withdraws the power to enforce arbitration agreements, we do not hold that §§ 3 and 4 of the Arbitration Act apply to proceedings in state courts. Section 4, for example, provides that the Federal Rules of Civil Procedure apply in proceedings to compel arbitration. The

Federal Rules do not apply in such state-court proceedings.[3]

Procedure before the arbitrators is a wholly different matter. This Court has repeatedly said that the FAA leaves the choice of arbitration procedure to the parties. *Mastrobuono v. Shearson Lehman Hutton, Inc., supra,* 514 U.S. at pp. 56-57; *Volt Information Sciences v. Board of Trustees of Leland Stanford Jr. U.,* 489 U.S. 468, 475-476, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989). "Just as [the parties] may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted." *Volt, supra,* 489 U.S. at p. 479 (citation omitted). "[T]he federal policy is simply to ensure the enforceability, *according to their terms,* of private agreements to arbitrate." *Id.* at 476.[4]

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[3] The California courts have taken full advantage of the latitude afforded the states in establishing state court procedures for enforcing arbitration. *See, e.g., Rosenthal v. Great Western Fin. Securities Corp.,* 14 Cal.4th 394, 405-410, 926 P.2d 1061, 58 Cal. Rptr.2d 875 (1996) (In a California superior court, state law determines whether a judge or jury will decide if the parties had entered into an arbitration agreement.)

[4] Even though the words "in accordance with the terms of the agreement" appear only in section 4 of the FAA, the congressional purpose of ensuring enforcement of arbitration agreements according to their terms underlies the entire FAA and is fully applicable to enforcement of arbitration agreements in state courts. For example, if the arbitration agreement provides for a panel of three arbitrators to decide the dispute, the FAA would preempt any state law, policy or order requiring arbitration before a single arbitrator. Otherwise, Congress' effort to place arbitration clauses on an equal footing with other contractual provisions and to obtain uniformity in their enforcement would be defeated. *See Southland Corp. v. Keating, supra,* 465 U.S. at 14-15.

Thus, the FAA affords states no latitude in devising procedures for the arbitration itself. The rules governing those proceedings are the rules to which the parties agreed. The FAA requires all courts, state and federal, to enforce the parties' agreement as written. California can no more require class-wide arbitration than it could demand arbitration before retired judges or specify that discovery must be permitted in arbitration. Any order setting a different procedure *in arbitration* than the parties agreed to stands as an impermissible obstacle to the FAA's purpose of ensuring that private agreements to arbitrate are *enforced according to their terms.*

The Court of Appeal decision improperly confuses these two quite different types of procedure, incorrectly treating an order for class-wide arbitration as governed by the same principles as the question of whether the Federal Rules of Civil Procedure apply in state court proceeding to enforce arbitration. *Southland Corp. v. Keating*, 465 U.S. at 16, n.10. Class-wide arbitration, however, is a procedure the parties and arbitrator(s) must follow in the arbitration itself. When the parties, themselves, have not agreed to such a procedure, the FAA affords states no discretion to require that procedure.

As the Seventh Circuit aptly stated:

> [T]he Supreme Court has repeatedly emphasized that we must rigorously enforce the parties' agreement as they wrote it, "even if the result is 'piece-meal' litigation." We are thus obliged to enforce the type of arbitration to which these parties agreed, which does not include arbitration on a class basis.

> . . . Since the parties' arbitration agreement does not expressly provide for class arbitration, the district court correctly concluded that it was prohibited from reading such a procedure into these arbitration agreements.

Champ v. Siegel Trading Co., Inc., supra, 55 F.3d at 277 (citation omitted)

Moreover, even if the rules governing preemption of state *court* procedures could be applied to the quite different issue of *arbitration* procedure, the Court of Appeal's opinion would still be wrong. Even the California Supreme Court has recognized that, "a state procedural statute or rule that frustrated the effectuation of [FAA] section 2's central policy would, where the federal law applied, be preempted by the [FAA]." *Rosenthal v. Great Western Fin. Securities Corp., supra,* 14 Cal.4th at 408. The state rule is preempted if it would stand " ' "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." ' " *Felder v. Casey,* 487 U.S. 131, 138, 108 S.Ct. 2302, 2307, 101 L.Ed.2d 123 (1988). Uniform national application of a federal substantive law requires, in particular, that state courts not apply procedural rules that would "frequently and predictably produce different outcomes . . . based solely on whether the [federal] claim is asserted in state or federal court." *Ibid.*[5]

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[5] Unfortunately, the California Supreme Court declined to apply this rule to the present case. In an earlier decision, *Keating v. Superior Court,* 31 Cal.3d 584, 608-614, 183 Cal. Rptr. 360, 645 P.2d 1192 (1982), *rev'd. in part sub nom., Southland Corp v. Keating,* 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed. 2d 1 (1984), the California Supreme Court had actually endorsed the idea of class-wide

The Court of Appeal opinion and its application of a procedure permitting the compulsion of class-wide arbitration violates both of these principles of federal preemption. It erects a California state procedural rule favoring class-wide arbitration as a major obstacle to enforcement of Congress' "primary purpose" of enforcing arbitration agreements *according to their terms.* Instead of the arbitration procedures the parties agreed to, the Court of Appeal opinion foists upon them class arbitration, a procedure not contemplated, mentioned, or agreed upon. As the Seventh Circuit has pointed out:

> "To substitute our own notion of fairness in place of the explicit terms of [the parties'] agreement would deprive them of the benefit of their bargain just as surely as if we refused to enforce their decision to arbitrate." We have a similar situation here. The parties' arbitration agreement makes no mention of class arbitration. For a federal court to read such a term into the parties' agreement would "disrupt[ ] the negotiated risk benefit allocation and direct[ ] [the parties] to proceed with a different sort of arbitration."

Champ v. Siegel Trading Co., Inc., supra, 55 F.3d at 275 (citation omitted).

The Court of Appeal decision is also wrong because it adopts a state procedure that will "frequently and predictably produce different outcomes . . . based solely

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arbitration. *See* n.6, below. Unreviewed, the Court of Appeal opinion is precedent on this issue which all lower California courts must follow. *Auto Equity Sales v. Superior Court,* 57 Cal. 2d 450, 455, 20 Cal. Rptr. 321, 369 P. 2d 937 (1962).

on whether the [federal] claim is asserted in state or federal court." *Felder v. Casey, supra*, 487 U.S. at 138. For the reasons explained below, if the arbitration enforcement proceeding is brought in federal court, arbitration will be enforced as to the individual claims of the named plaintiffs only. The Court of Appeal decision dictates a totally different outcome if the arbitration enforcement proceeding is brought in state court. Assuming the case is otherwise suitable for class certification, a state court would be required to order arbitration on a class-wide basis.

The outcome is different no matter how the arbitrator decides. If arbitration is compelled by the federal court, only the named parties' claims and defenses will be decided. If a state court orders arbitration, the additional claims of putative class members must also be determined by the award. Moreover, the procedure followed in arriving at the award is entirely different, just as class actions in court differ markedly from ordinary litigation.

The Court of Appeal's conclusion that its rule "will not produce different outcomes *on the merits* based solely on whether the claim is asserted in state or federal court" (Opn., 28) is doubly flawed. First, the FAA is concerned with procedure as much as, if not more than, outcome on the merits. The FAA commands enforcement of the arbitration procedure that the parties agreed upon, even if the outcome on the merits would be no different than that which a judge or jury would reach by a different route. By dictating a different arbitration procedure than the parties agreed upon, the Court of Appeal decision requires a different "outcome" that is offensive to and hence preempted by the FAA.

Second, the award in a class-wide arbitration is, in fact, vastly different than the award in an individual arbitration of the same claim. Different claims are being adjudicated with entirely different results for members of the putative class and the defendant(s) alike.

This non-uniformity of results cannot be excused on the ground that the state law procedure (class-wide arbitration) results in more, rather than less, arbitration. The FAA's purpose was not to force parties to arbitrate, but to enforce their agreements to do so. Giving parties more arbitration than they bargained for is just as disruptive of Congress' purpose as affording the parties less arbitration than they agreed upon.

IV

THE COURT OF APPEAL OPINION DESTROYS UNIFORMITY AND ENCOURAGES FORUM SHOPPING CONTRARY TO CONGRESS' INTENT

If the Court of Appeal opinion is allowed to stand, California state courts will enforce an arbitration clause in a radically different manner than the identical clause will be enforced in federal courts in that state or in state or federal courts elsewhere. Non-uniform enforcement of arbitration clauses is one of the evils Congress sought to cure by enacting the FAA. The Court of Appeal's disparate approach will create unnecessary conflicts between state and federal courts and both encourage and reward forum shopping.

Under the Court of Appeal opinion, when a California state court is asked to enforce an arbitration clause

governed by the FAA, it can and must order that arbitration to proceed on a class basis, if the action is otherwise suitable for class certification.

As the Court of Appeal acknowledged (Opn., 16), if the same arbitration clause is enforced in a California federal court, the result will be radically different. The federal court will order the putative class representatives to proceed to arbitration of their individual claims only. No class-wide arbitration can or will be ordered.

The Seventh Circuit has squarely held that "absent a provision in the parties' arbitration agreement providing for class treatment of disputes, a district court has no authority to certify class arbitration." *Champ v. Siegel Trading Co., Inc., supra,* 55 F.3d at 271. A number of federal district court decisions agree. (See Opn., 16.) There is *no* contrary federal court precedent. No published federal decision has ordered or approved class-wide arbitration under the FAA.

There is no reason to believe that California federal district courts or the Ninth Circuit will break company with the Seventh Circuit and the other, unanimous federal authority on this issue. The Seventh Circuit's holding is based, in part, on the all-but-unanimous federal case law holding that absent an express contractual provision permitting it, federal courts cannot "require consolidated arbitration, even where consolidation would promote the expeditious resolution of related claims." *Id.* at 274-275.

The Ninth Circuit adheres firmly to the no-consolidation rule. *Weyerhaeuser Co. v. Western Seas Shipping Co.,* 743 F.2d 635, 637 (9th Cir. 1984). In doing so, the Ninth

Circuit pointed out that federal courts must enforce arbitration clauses according to their terms; arbitration is a creature of contract, in effect, a specialized type of forum selection clause that not only chooses the site of litigation " 'but also the procedure to be used in resolving the dispute.' " *Ibid.* There is no reason to think that the Ninth Circuit would abandon the rationale it stated in *Weyerhaeuser* and hold that federal district courts can force class-wide arbitration on parties whose contracts do not explicitly authorize that procedure.

That being so, the Court of Appeal's contrary conclusion will inevitably lead to innumerable conflicts between California state and federal courts. A savvy class action plaintiff's attorney will file suit in state court if his client has signed an arbitration clause. The plaintiff's attorney will then demand class-wide arbitration under the authority of the Court of Appeal decision in this case. Upon the defendant's refusal to comply, the plaintiff's attorney will move, in state court, for an order compelling arbitration class-wide.

If it can find an adequate basis for federal jurisdiction, the defendant will counter by filing a separate action under the FAA in federal court, seeking to compel arbitration on an individual basis in accordance with the Ninth Circuit's decision in *Weyerhaeuser*. The federal district court cannot abstain. *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 18-22, 103 S.Ct. 297, 74 L.Ed.2d 765 (1983); *Metropolitan Life v. Lockette*, 155 F.3d 1339, 1341 (11th Cir. 1998). The district court will issue an order compelling individual arbitration. That order will directly conflict with the order the California

state court will issue in the same controversy, directing arbitration on a class-wide basis.

Neither order compelling arbitration is an appealable, final order, 9 U.S.C. § 16; *In re Pisgah Contractors, Inc.*, 117 F.3d 133, 135 (4th Cir. 1997); Cal. Code of Civ. Proc., § 1294; *United Firefighters of Los Angeles v. City of Los Angeles*, 231 Cal.App.3d 1576, 1581-1582 (1991), so neither will operate as res judicata until after completion of the arbitration. But how is the arbitration to be completed: on an individual basis or a class basis? Which court order will the parties and the arbitrator obey?

Obviously, this type of conflict between state and federal courts is highly undesirable for the courts, the arbitrators, and the parties. It is exactly the type of conflict that Congress sought to eliminate by enacting the FAA. Rejecting the claim that the FAA is solely procedural and applicable only to federal courts, this Court observed that if this interpretation were correct

> claims brought under the California Franchise Investment Law are not arbitrable when they are raised in state court. Yet it is clear beyond question that if this suit had been brought as a diversity action in a federal district court, the arbitration clause would have been enforceable. The interpretation given to the Arbitration Act by the California Supreme Court would therefore encourage and reward forum shopping. We are unwilling to attribute to Congress the intent, in drawing on the comprehensive powers of the Commerce Clause, to create a right to enforce an arbitration contract and yet make the right dependent for its enforcement on the particular forum in which it is asserted. . . . Such an

> interpretation would frustrate congressional intent to place "[a]n arbitration agreement . . . upon the same footing as other contracts, where it belongs."

Southland Corp. v. Keating, supra, 465 U.S. at 15-16 (citations & fns. omitted).

The Court of Appeal's decision in this case will "encourage and reward forum shopping" in just the same manner. Plaintiffs will flock to California state courts. Defendants will make every effort to remove cases to federal court or commence independent actions there to compel arbitration. It is an invitation to a jurisdictional nightmare of the same type, but potentially even more harmful than that quashed by this Court's decision in *Southland Corp. v. Keating.*[6]

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[6] In *Southland v. Keating,* this Court reversed in part the California Supreme Court's decision in *Keating v. Superior Court,* supra, 31 Cal.3d at, 608-614, that certain state franchise claims could not be arbitrated. The Court did not address the remaining portion of *Keating v. Superior Court* which approved class-wide arbitration. This Court found the issue had not been properly preserved below. *Southland Corp. v. Keating, supra,* 465 U.S. at 8-9,-17. This case presents no such procedural obstacle to correcting the *Keating* court's second error. *Keating* based its support for class-wide arbitration on two pillars, each of which has been undermined by later case law. First, *Keating* held that California's public policy favoring consumer class actions overrides the parties' agreement to arbitration by a different means. The FAA preempts state policies of this type, as this Court's later decisions hold. *E.g., Allied-Bruce Terminix Cos. v. Dobson, supra,* 513 U.S. at 273-274. Second, *Keating* relied, by analogy, on lower federal court cases permitting a court to order consolidation of independent arbitration proceedings. The tide of decisions has now reversed on that shore as well. Every

Nor will the forum shopping and jurisdictional wrangle be limited to California state and federal courts. Nationwide class actions have become increasingly popular with the plaintiffs' bar. States such as California permitting class-wide arbitration will naturally attract nationwide class actions that might be filed elsewhere but for the parties' agreement to arbitrate their disputes – once again, encouraging and rewarding forum shopping.[7]

Alabama's recent experience with class actions provides a dramatic illustration of the likely effect of the Court of Appeal opinion. For several years in the early 1990's Alabama's courts were viewed as particularly receptive to class actions in general and nationwide class actions in particular. A veritable flood of putative national class suits were filed in Alabama courts, *Ex Parte First National Bank of Jasper*, 717 So.2d 342, 347 (Ala. 1997), until the Alabama Supreme Court recently brought Alabama law into conformity with class action precedents in other states and the federal courts. *Id.; see also Ex Parte Green Tree Financial Corp.*, 723 So.2d 6 (Ala. 1998).[8]

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federal circuit but the first has now held that a court has no power to order consolidation of arbitrations unless the parties expressly agree to it. Opn., 21; *but cf. New England Energy Inc. v. Keystone Shipping Co.*, 855 F.2d 1, 3 (1st Cir. 1988).

[7] At least one other state, Pennsylvania, appears to have adopted a rule permitting state-wide arbitration even in situations governed by the FAA. *Dickler v. Shearson Lehman Hutton, Inc.*, 408 Pa. Super. 286, 596 A.2d 860 (1991). If decisions like that of the Court of Appeal and the *Dickler* court remain undisturbed, there is nothing to prevent other state courts from straying from the FAA's mandate for uniformity.

[8] Interestingly, when recently confronted with the very question raised in the present case, the Alabama Supreme

The concern is not that California will be inundated with class actions; it already is. The real problem is that significant arbitration rights will turn strictly on the choice of forum. The national arbitration programs designed by AFSA, CFSA and CBA members to deliver a uniform result to their customers will produce radically different arbitration proceedings based solely on where the first class claimant chooses to proceed. This lack of uniformity in enforcement is what Congress sought to cure by enacting the FAA.

V

CONCLUSION

The Court should step in now, grant certiorari in this case, and re-establish the uniformity that the FAA was enacted to achieve. For the reasons stated above, AFSA, CFSA, CBA and their members urge the Court to grant

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Court, citing *Champ v. Siegel Trading Co., Inc., supra,* declined to allow class-wide arbitration. *Med Center Cars, Inc. v. Smith* 727 So.2d 9, 20 (Ala. 1998), ("[W]e conclude that to require class-wide arbitration would alter the agreements of the parties, whose arbitration agreements do not provide for class-wide arbitration.")

the petition for writ of certiorari and reverse the Court of Appeal opinion.

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In The

Supreme Court of the United States

BLUE CROSS OF CALIFORNIA, CALIFORNIACARE HEALTH PLANS, WELLPOINT HEALTH NETWORKS INC., A California Corporation,

Petitioners,

vs.

CALIFORNIA SUPERIOR COURT; ELIZABETH FARQUHAR and LAURIE WINETT, individually, on behalf of themselves and all others similarly situated,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, Second Appellate District

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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REPLY ARGUMENT

Petitioners (hereafter "Blue Cross") reply to new points raised by the brief in opposition of Respondents Elizabeth Farquhar and Laurie Winnet (hereafter "subscribers") asserting that: (1) "this Court lacks jurisdiction" to consider the petition;[1] (2) until a "final judgment" is entered requiring classwide arbitration of all similarly situated Blue Cross subscribers, resolution of the preemption question would be "premature";[2] and (3) "the California court[s] correctly construed the terms of the contract to permit a classwide arbitration *under California's procedural rules*."[3]

Subscribers offer no valid objection to the Court's consideration, on the merits, of the important question of statutory interpretation and constitutional law left unresolved after *Keating*.[4]

A. Jurisdiction Is Vested In This Court To Consider The Federal Questions Presented By The "Final Judgment Or Decree" Of The California Courts Denying Blue Cross's Petition To Compel Arbitration According To The Terms Of The Parties' Agreements

In arguing that "this Court lacks jurisdiction to grant Blue Cross's petition" (Brief in Oppos. at p. 8),[5] subscribers

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[1] Brief in Opp. at pp. 8 and 6-10.

[2] Brief in Opp. at pp. 6-7.

[3] Brief in Opp. at p. 12 (brackets and emphasis added); *id.* at 11-14.

[4] *Keating v. Superior Court*, 31 Cal.3d 584, 545 P.2d 1192, 183 Cal.Rptr. 380 (1982), *rev'd in part and appeal dismissed in part sub nom., Southland Corp. v. Keating*, 465 U.S. 1, 8-10 (1984).

[5] It should be noted that subscribers did not argue in any court below that the trial court's decision to allow judicially supervised classwide arbitration procedures to go forward, despite the mandates of the FAA, was not ripe for appellate review; and of course, the California court of appeal expressly found that it was. (App. 5-6.)

misread the pertinent language of the jurisdictional statute making reviewable by certiorari "final judgments or decrees" of a state's highest court on federal questions. 28 U.S.C. § 1257(a). (App. 47-48.)[6] In the instant case, Blue Cross asserted a right under federal law (the FAA) to be free from the burdens of classwide arbitration, including ongoing judicial involvement and civil discovery, on the grounds that the arbitration clause in issue did not provide for such an onerous and judicially supervised procedure.

Thus, jurisdiction in this Court is vested by virtue of the final "judgment or decree" of California's highest court which declined to enforce the provisions of the arbitration agreements between Blue Cross and the subscribers *as written*. 28 U.S.C. § 1257(a); S.Ct. Rule 13.1. (*See also* Pet. Mem. at pp. 2, 8 and App. 43.) The California courts' decisions under review in this case are in substantially the same procedural posture as in *Keating*, when this Court concluded that state law impediments to enforcement of the right to compel contractual arbitration were preempted by the FAA. *Southland Corp. v. Keating*, 465 U.S. 1, 9-10 (1984).[7]

Procedurally, *Keating* also arose through the California court system by way of petitions for writ of mandate, and related interim appeals, involving issues that "do not concern

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[6] "[I]n modern usage *decree* is broad enough to refer to *any court order* . . . " BRYAN A. GARNER, DICT. OF MODERN LEGAL USAGE at 253 (Oxford U. Press 1995) (second emphasis added).

[7] Under section 2 of the FAA, agreements to arbitrate "shall be valid, irrevocable, and enforceable. . . . " 9 U.S.C. § 2. (App. 45; Pet. Mem. at pp. 2, 9-10.)

the merits of [the parties' underlying] disputes, but rather the forum and procedure for their resolution. Southland contends that the disputes should be submitted to arbitration on an individual (i.e., franchisee-by-franchisee) basis, pursuant to an arbitration provision contained in its agreement with each franchisee." *Keating*, 31 Cal.3d at 590 (brackets added).[8]

Like the subscribers in this case, respondents in *Keating* (individual franchisees) raised the same "jurisdictional" objection to consideration of the preemption issues then before this Court. The franchisees maintained that Southland's direct appeal under the predecessor statute of 28 U.S.C. § 1257 should be dismissed because the decision of the California Supreme Court was not a "final judgment or decree." *Southland Corp. v. Keating*, 465 U.S. at 6.[9] This Court disagreed:

> Without immediate review of the California holding by this Court there may be no opportunity to pass on the federal issue and as a result "there would remain in effect the unreviewed decision of the State Supreme Court" holding that the California

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[8] There is one significant procedural difference between this case and *Keating*: In each of the courts below, Blue Cross expressly opposed class arbitration procedures "on federal grounds" under the FAA and the Supremacy Clause. (*Cf.* Pet. Mem. at p. 11; Ct. App. Opn. at App. 2 ("the issue is whether the [FAA] preempts California decisional authority authorizing classwide arbitration"); Superior Court's order at App. 41, ¶3 ("The issue is whether the Federal Arbitration Act ('FAA') bars class arbitration, where the parties' agreement is silent on the subject").)

[9] 28 U.S.C. § 1257(2), repealed in 1988, previously allowed for the right of direct appeal from a state court if its decision "involved the validity of a state statute contested under some federal provision and the state court upheld the statute." COMMENTS ON 1988 REVISION OF 28 U.S.C. § 1257, 28 U.S.C.A. §§ 1251 to 1331 at p. 96 (West's 1993). The predecessor statute contained the identical "final judgment or decree" proviso for review on direct appeal or certiorari. *Id.* at 96-97.

> statute does not conflict with the Federal Arbitration Act. [*Citing Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 485 (1975).] On the other hand, ***reversal of a state-court judgment in this setting will terminate litigation of the merits of this dispute***.
>
> Finally, the failure to accord immediate review of the decision of the California Supreme Court might "seriously erode federal policy." ***Plainly the effect of the judgment of the California court is to nullify a valid contract made by private parties under which they agreed to submit all contract disputes to final, binding arbitration***. *Southland Corp. v. Keating*, 465 U.S. at 6-7 (emphasis and brackets added).[10]

These principles of "finality" apply with equal force to the pending petition which asks for resolution of a question now squarely framed by the California courts and left undecided by *Keating* – namely, whether the FAA preempts California's state-based classwide arbitration procedures in contravention of the views expressed by a substantial majority of federal circuits and other states.

B. The California Court of Appeal Addressed, And Properly Rejected, Subscribers' "Ripeness" Argument

Subscribers next erroneously contend that consideration of the preemption question is "premature," at least until there has been a "final judgment" on certification of the class.

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[10] In more recent terms, this Court has granted certiorari to review the "interim," procedural orders of state courts *denying* petitions to compel by parties seeking to enforce arbitration contracts under the FAA, or to stay litigation commenced in violation of such agreements. *E.g.*, *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 270-72 (1995) (certiorari granted after interim appeal to Alabama Supreme Court); *Doctors' Associates, Inc. v. Cassaroto*, 517 U.S. 681, 684-85 (1996) (certiorari twice granted after interim appeals denying arbitration by Montana Supreme Court).

(Brief in Oppos. at pp. 6-7, 10-11.) They claim that the case "is not yet far enough along in the proceedings to provide a complete evidentiary record to address the *Keating* issue." (*Id.* at p. 7.) This is essentially a challenge to the "ripeness" of the controversy. The court of appeal's decision below explicitly rejected "prematurity" as a proper ground to avoid deciding that issue:

> To allow discovery to proceed as to the existence of a class if classwide arbitration is not allowed would waste judicial resources and burden the parties with unnecessary expense of time and money. In addition, to defer a decision on this issue would result in "lingering uncertainty in the law." . . . Therefore, whether the trial court erred in refusing to stay the litigation is an issue that is ***ripe for resolution***. This case does not present an "abstract difference [ ] of legal opinion" for resolution, nor will it result in our issuing a "purely advisory opinion [ ]." The present case involves concrete issues – may discovery proceed on whether there should be class certification with the potential that plaintiffs will later be joined in classwide arbitration. (App. 5-6 [emphasis added, bracketed text in original and internal citations deleted].)

Undaunted, subscribers alternatively suggest that the "petition may be rendered moot when this case is permitted to go forward in the lower courts [assuming the class is *not* certified]." (Brief in Oppos. at p. 17.) Subscribers' circular ripeness/mootness argument only serves to underscore the existence of a presently justiciable controversy: The ripeness doctrine "asks whether an injury that has not yet happened is sufficiently likely to happen, and mootness asks whether an injury that has happened is too far beyond a useful remedy." 13A C. WRIGHT, A. MILLER AND E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.12 at 50 (2d ed. 1984); *see also Warth v. Seldin*, 422 U.S. 490, 499, n. 10 (1975). Once forced to go

through the "class certification" process, a party in the position of Blue Cross has lost the benefit of the federal statute. Again, *Keating* provides the answer:

> The [FAA] permits "parties to an arbitrable dispute [to move] out of court and into arbitration as quickly and easily as possible."
>
> Contracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts. Such a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate. *Southland Corp. v. Keating*, 465 U.S. at 7; *citing Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 22 (1983) (brackets in original text, internal citation omitted).

When the California Supreme Court declined to review the published decision of the court of appeal approving the implementation of *Keating*'s classwide arbitration procedures, that was "the final word of a final court." (Brief in Oppos. at pp. 8-9; *citing Jefferson v. City of Tarrant*, 522 U.S. 75, 118 S.Ct. 481, 485-86 (1997). As amici aptly point out, not only is the decision on the preemption question *final* in the sense that it is reviewable, the opinion below "is precedent on this issue which all lower California courts must follow" until it is overturned. (Amici Brief of AFSA, et al. at pp. 9-10 & n. 5.)[11]

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[11] Subscribers take the court of appeal's discussion of "prematurity" later in its opinion out of context. In response to Blue Cross's objection that it should not be required to participate in "hybrid" classwide arbitration requiring judicial intervention, the opinion suggested based upon earlier California cases that "[t]his argument is premature" as a rationale for barring a classwide arbitration that had not yet been certified. (App. 33; Brief in Oppos. at 6.) The substantial weight of authority in other jurisdictions applying the FAA is in fundamental disagreement with that point of view. (*See* Amici Brief at pp. 8-18; Pet. Mem. at 11-18; Section C, *infra*, at pp. 8-9.)

C. The Benefit Agreements Provided That The "American Arbitration Association Commercial Arbitration Rules" Would Govern – Rather Than California Arbitration Act Procedures As Subscribers Erroneously Maintain

Subscribers' final contention – that a California choice-of-law clause somehow incorporated classwide procedures into the subscription agreements – is built on a false premise. (Brief in Oppos. at pp. 11-12.) The court of appeal's decision rejected this construction, which stems from the subscribers' misinterpretation of *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468 (1989):

> Contrary to plaintiffs' assertion, *Volt* does not compel this court to conclude that by virtue of the choice-of-law provision in the underlying health insurance agreements the parties agreed California's classwide arbitration rule would govern this case. . . . *Volt* [ ] rested on the assumption the parties had incorporated California arbitration rules into their agreement[. . . , and] *Volt* held only that the act does not prevent the enforcement of agreements to arbitrate under state rules. (App. 31, n. 8; *citing Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58-60 & n. 4 (1995) [brackets added, internal citations omitted].)

Further contrary to their argument, "There has been no finding in the present case that the parties expressly agreed to incorporate California's arbitration rules into their agreements." (App. 31, n. 8; *see also* Pet. Mem. at p. 22.) Instead, the agreements to arbitrate provide for resolution of individual disputes governed by the procedures of the AAA Commercial Arbitration Rules. (*See* Brief in Oppos. at p. 4, ¶C.) The controversy exists because the California courts erroneously accepted subscribers' position that compelling

classwide arbitration "does not conflict" with their agreements to proceed under the AAA commercial rules. (Brief in Oppos. at p. 10; App. 33.)[12]

Almost simultaneously with the decision of the California court in this case holding that state-based classwide procedures were "consistent" with the FAA where the parties have selected the AAA commercial rules, the Alabama Supreme Court reached exactly the opposite conclusion. In *Med Center Cars, Inc. v. Thompson*, 727 So.2d 9 (Ala. 1998), as in the present case, defendants argued "that most federal courts have rejected the use of class-wide arbitration, regardless of whether the proceedings involved common questions of law or fact, unless the language in the arbitration agreement specifically provides for class-wide arbitration." 727 So.2d at 20. The "plaintiff class representatives" urged the adoption of state-based classwide procedures because the parties' agreement and "the FAA [were] silent as to that issue." *Ibid.* The Alabama Supreme Court held:

> Although the plaintiffs' contentions are practically appealing, after reviewing the authorities we conclude that to require class-wide arbitration ***would alter the agreements of the parties, whose arbitration agreements do not provide for class-wide arbitration***. *Med Center Cars*, 727 So.2d at 20 (emphasis added).[13]

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[12] Notwithstanding subscribers' erroneous interpretation, AAA's commercial rules *do not* provide for classwide arbitration; at best, they are "silent" on the subject. (Compare Brief in Oppos. at pp. 7-8 with AAA commercial rules at App. 63-67.) Moreover, a substantial body of cases acknowledge AAA's "long-established policy *of not approving [even] consolidation [of arbitrations] without the written consent of all parties*." *Balfour, Guthrie & Co., Ltd. v. Commercial Metals Co.*, 93 Wash. 2d 199, 203, 607 P.2d 856, 858 (1980) (brackets added). (Pet. Mem. at pp. 14-15 & n. 6.)

[13] *Med Center Cars* also observed that "no persuasive authority permitting class-wide arbitration exists at this time. . . . 'For a federal court to read such a term [class-wide arbitration] into the parties' agreement would 'disrupt [ ] the negotiated risk/benefit allocation and direct [ ] [the

Presently, a majority of states and the "Second, Fifth, Sixth, [Seventh,] Eighth, Ninth, and Eleventh Circuits have held that ***absent an express provision in the parties' arbitration agreement***, the duty to rigorously enforce arbitration agreements . . . [precludes] consolidated [or classwide] arbitration," because to do so would fundamentally and impermissibly alter the nature of the agreement to arbitrate. *Med Center Cars*, 727 So.2d at 20 & n. 4 (emphasis added) (classwide procedures rejected as inconsistent with AAA commercial rules chosen by the parties). The First Circuit, California and Pennsylvania have taken the opposite position. (App. 17-25 & n. 5.)

Consistent with the majority view of the FAA's requirements, Blue Cross has argued in the California courts "there would be nothing in the contract that could possibly constitute evidence of an intent to [submit to judicially-imposed classwide arbitration procedures]." *Mastrobuono*, 514 U.S. at 59-60; *Doctors' Associates*, 517 U.S. at 688. (Pet. Mem. at 18-25.) This important question of statutory construction and constitutional preemption is ripe for determination. If not decided by this Court, then conflicting interpretations of the FAA will continue in the state and federal courts unabated. (Pet. Mem. at pp. 25-27; Amici Brief at pp. 15-19.)

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parties] to proceed with a different sort of arbitration. . . . ' " 727 So.2d at 20; *citing Champ v. Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995) *quoting New England Energy, Inc. v. Keystone Shipping Co.*, 855 F.2d 1, 10 (1st Cir. 1988) (Selya, J., dissenting) (brackets in original). (*Cf.* Pet. Mem. at pp. 17-18 & n. 9.)

CONCLUSION

None of subscribers' objections – to jurisdiction, ripeness or the procedural rules governing the agreements to arbitrate – is well taken. The petition for writ of certiorari accordingly should be granted.

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